UNLOCKING THE IMPACT OF SOUTH AFRICA'S CORRECTIONAL CENTRE CONDITIONS ON INMATES' RIGHTS

By

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Submitted in fulfilment of the requirements for the degree:

Masters of Laws LLM by Dissertation (Research) LAWS8002

Faculty of Commerce, Law and Management - School of Law

University of Witwatersrand

2017

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DECLARATION

I, **Meera Lalla (Student Number: 0601655G)** under the auspices of my supervisors, (Prof Kasturi Moodaliyar and Prof. Lilian Chenwi) hereby declare that the attached dissertation entitled **"Unlocking the Impact of South Africa's Correctional Centre Conditions on Inmates' Rights"** is my own independent work. It is submitted in fulfillment of the requirements of the degree of Masters of Laws (LLM) in the Faculty of Commerce, Law and Management at the University of Witwatersrand, Johannesburg. I further confirm that my dissertation has not previously been submitted (either partially or in its completion) for the fulfilment of any other degree or qualification to the University of Witwatersrand or to any other university.

SIGNED AND DATED AT Braamfontein ON THE _13th_ DAY OF October 2017.

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MEERA LALLA

ACKNOWLEDGMENTS

> Please observe this wretched man sentenced to a life of imprisonment. Each day he wakes up with nothing to look forward to. He has lost all contact with the outside world. Even his own family no longer communicates with him. He wishes that he had never been born, and prays for his life to end. He would like to commit suicide, but his imprisonment will not provide such freedom. When your compassion, my dear son (daughter), is strong for this soul that you are even willing to take his place so that he can be relieved of his torment, then you will be a candidate for the Kingdom of God. [Swami Krishnapada *The Beggar: Meditations and Prayers on the Supreme Lord"* (1994) 113 – 114.]

All glories to the Supreme Personality of Godhead who has inculcated in my very soul that compassion and love for every human being is the key to the doors that separate us. My humble thanks and obeisance are firstly offered to my dear sweet Lord who has given me the strength and courage to walk in my shoes.

The source of my inspiration to write my dissertation stemmed at the age of nine years old when a serial killer took the life of my father and left me to my own vices. Throughout my entire life, this tragic experience had me contemplating the inner workings of a criminal's mind. Upon closer introspection and years of critical thought, I discovered that the very same inmate who sits locked away in a confined cell, guilty with my father's blood on his hands still remains a human being. Then the aforementioned words of Swami Krishnapada echoes in my mind, profound and thought provoking. At this point in time, I had one question that I needed to answer: What rights do inmates have? I then embarked on my dissertation in an attempt to answer this fundamental question, amongst others.

I would like to pay tribute to my late father Mr. Amrit Lalla by dedicating my dissertation to him in his loving memory. May his soul rest in peace and may the Lord be the ultimate judge of the thoughts, actions and deeds of the inmate that took his life.

The enthralling journey of codifying my thoughts onto paper and formulating a piece of work that I could place my name on and call my dissertation was fraught with blood, sweat and tears. It took years of critical thought and an inner battle to realise the truth in what I was advocating. This was contrary to the many people I met along the way who thought that a topic of this nature should

rather be left to someone other than me. At the brink of throwing in the towel, I stood at cross roads with signboards of personal, work and career commitments.

Thank you mum for being my pillar of strength in this regard. My mother's undying love and support helped me to meet my deadline or death-line as I jokingly called it. Locked behind my room doors typing my dissertation, I often simulated the feeling of being an inmate, an inmate to my dissertation. Finally, my shackles have been opened and I now present my dissertation to the reader and pray that I have conveyed the message that lied deep within my soul.

I would like to thank my supervisors: Prof. Kasturi Moodaliyar and Prof. Lilian Chenwi for guiding and supporting me throughout this journey. Without their patience and understanding, I would be nowhere. I would like to extend a special vote of thanks to Prof. Jonathan Klaaren for believing in me. Finally, I would like to extend my sincere gratitude to the University of Witwatersrand's School of Law and the Wits Law Clinic. I appreciate every dedicated member of staff's contribution to my career.

ABSTRACT

Inmates' rights are of utmost importance in shaping a democratic society based on human dignity, equality and freedom. The State cannot unjustifiably infringe on inmates' rights and continue to play an active role in exacerbating correctional centre conditions. This study is of significance in confronting the reality of the plight of inmates' rights violations in a country that is plagued with crime and scepticism towards acknowledging inmates' rights.

The dissertation offers a critical analysis of the impact of South Africa's correctional centre conditions on inmates' human rights in a constitutional democracy. The study unlocks three key correctional centre conditions that impact on inmates' rights. These three correctional centre conditions have been identified as overcrowding, gangsterism and sexual violence, and access to healthcare facilities. In delving deeper into each of the aforementioned correctional centre conditions, international, regional and statutory instruments were examined. Thus, the dissertation also considered the extent of South Africa's compliance with its international human rights and constitutional obligations to protect and enforce inmates' rights.

The study has investigated the State's accountability in relation to South Africa's infringement on inmates' rights. This endeavour was realised by tracing trends and statistics from State reports. An enquiry into ground-breaking case law addressing the impact of correctional centre conditions on inmates' rights demonstrated the need for, inter alia, Constitutional Court litigation as a form of recourse for inmates and emphasised the State's responsibility to prohibit the cruel, inhuman and degrading punishment of inmates.

The dissertation has observed that over a period of 20 years of democracy, South Africa's correctional centre conditions have severely impacted on inmates' rights directly and indirectly. It concludes that firstly, the primary problem of overcrowding is a global phenomenon and that there is no single solution to fully eradicate its spiralling consequences. Overcrowding infringes on inmates' foundational rights - rights to accommodation, fair trial, food and privacy. Secondly, the impact of gangsterism and sexual violence in South African correctional centres has severely infringed on inmates' rights and case law evidences that this correctional centre condition has been

ruled as cruel, inhuman and degrading punishment by the United Nations Human Rights Committee. This study observes that the incidence of rape in correctional centres is a common practice and there is a greater risk of transmission of communicable diseases. In the treatment of these communicable diseases, an inmate is dependent on State healthcare facilities. Thirdly, the dissertation concludes that there have been specific instances where there was limited or no access to healthcare facilities which infringed on an inmates' right to healthcare and life. In this regard, the Constitutional Court has held the State accountable for the infringement of an inmate's right to access healthcare facilities. Therefore, this dissertation clearly illustrates that South Africa does not comply with its international, regional and domestic obligations. Practical recommendations for reform of South Africa's correctional centre conditions are then offered so as to prevent the infringement of inmates' human rights.

TABLE OF CONTENTS

Chapter 2: Inmates' Rights as informed by International, Regional, Constitutional and Statutory Law

Chapter 3: The Impact of Overcrowding on Inmates' Rights

Chapter 4: The Impact of Gangsterism and Sexual Violence on Inmates' Rights

Chapter 5: The Impact of Limited or No Access to Healthcare on Inmates' Rights

Chapter 6: Conclusion and Recommendations

List of in text Diagrams and Tables

ABBREVIATIONS AND ACRONYMS

ABET	Adult Basic Education and Training
ACHPR	African Charter on Human and Peoples' Rights
ANC	African National Congress
ARV/ART	Antiretroviral Therapy or Drugs
CALS	Centre for Applied Legal Studies
CAT	United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CCTV	Closed Circuit Television
CSPRI	Civil Society Prison Reform Initiative
CSVR	Centre for the Study of Violence and Reconciliation
DCS	Department of Correctional Services
ECHR	European Convention on Human Rights
EMPP	Electronic Monitoring Pilot Project
JCPS	Justice, Crime, Prevention and Security Cluster
JICS	Judicial Inspectorate for Correctional Services
HIV and AIDS	Human Immunodeficiency Virus and Acquired Immune Deficiency Syndrome
ICCPR	International Covenant on Civil and Political Rights
ICCV	Independent Correctional Centre Visitor
ICESCR	International Covenant on Economic, Social and Cultural Rights
KHULISA	Khulisa social Solutions, an international Non-profit Organisation
NICRO	National Institute for Crime Prevention and Reintegration of Offenders
NPA	National Prosecuting Authority
PRI	Penal Reform International
SAHRC	South African Human Rights Commission
SAPS	South African Police Services
SCA	Supreme Court of Appeal

SDU	Self-Defence Unit
SOOG	Strategic Outcomes Oriented Goal
STI	Sexually Transmitted Infections
TAC	Treatment Action Campaign
TRC	Truth and Reconciliation Commission
TB	Tuberculosis
UNAIDS	Joint United Nations Programme on HIV and AIDS
UNICEF	United Nations Children's Fund
UNISA	University of South Africa
WHO	World Health Organisation
WJP	Wits Justice Project

CHAPTER 1: INTRODUCTION

1.1. Background

> The Republic of South Africa is one, sovereign, democratic state founded on human dignity, the achievement of equality and the advancement of human rights and freedoms.[1]

The Constitutional Court as it stands today in its commemorative edifice is an idiosyncratic irony that epitomises human rights in the midst of an old Johannesburg precinct,[2] implicitly placing inmates' human rights at its forefront yet casts this contradistinction of the past away into the future.[3] It is therefore innate for *any* South African citizen to seek answers to questions that lie at the heart of their human rights at the Constitutional Court, which is the highest court in all constitutional matters.[4] All other courts in the South African hierarchy are independent but always subject to the tenets of the Constitution.[5]

The direct contrasts are apparent in the innovative design of the Court. Emphasis is placed on parts of the jail and simultaneously, culminates the contemporary privilege of human rights. Number Four, a division of the prison is retained for purposes of a museum. Visitors are encouraged to take a tour of the dark concrete cells that are adorned with phrases from the Bill of Rights. This picturesque image conjures up feelings reminiscent of the apartheid era, in order to strike an appreciation of the struggle for *our* existent rights.[6]

The words of Nelson Mandela echo within the prison walls: '[N]o one truly knows a nation until one has been inside its jails. A nation should not be judged by how it treats its highest citizens but its lowest ones – and South Africa treated its imprisoned African citizens like animals'.[7]

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[1]The Constitution of the Republic of South Africa, 1996 s 1(a) (Hereinafter referred to as the Constitution).
[2]The Fort (Constitutional Hill Foundation 2006).
[3]F Buntman 'Prisons and Democracy: Lessons Learned and Not Learned, from 1989 to 2009' (2009) 22 *International Journal of Politics, Culture and Societies* 401, 402.
[4]The Constitution s 167(3)(a). Please note that the Constitutional Court is not the only avenue that a citizen can adopt when seeking answers to questions that lie at the heart of their human rights; however, my dissertation will highlight the fact that the Constitutional Court remains a court that is yet to address the infringement of inmates' rights.
[5]The Constitution s 165(2)(a).
[6]Buntman (note 3 above).
[7]N Mandela *Long Walk to Freedom: The Autobiography of Nelson Mandela* (1994) 174 – 175.

One can infer from Nelson Mandela's words that a Constitutional Court is not to prioritise the rights of its law-abiding citizens at the expense of its inmates. Correctional centres operate in parallel mechanisms to the rights enshrined in the Constitution, subtracting from the primary right to liberty. Yet they are also expected to uphold the residue of inmates' constitutional rights.[8]

South Africa's status as a democracy does not detract from its existing correctional centres and its incidental correctional centre conditions. This strengthens the debate that the State does not have blanket immunity in the infringement of inmates' rights and in fact casts a greater burden on their accountability in this regard.[9]

Prior to the introduction of apartheid in 1948, South African correctional centres were utilised to propagate white capitalist supremacy.[10] At the dawn of apartheid, South African correctional centres were renowned for the exploitation of inmates' rights either through racial discrimination or through politically motivated agendas.[11] Thus, the very institution of a correctional centre in South Africa during the apartheid era created the foundation upon which correctional centre gang culture was born and which still subsists to date. Inmates' human rights violations emanated years ago, more specifically during the period from 1 March 1960 up until 10 May 1994.[12]

The Truth and Reconciliation Commission (TRC) was tasked to investigate these apartheid human rights violations. In July 1997, the TRC held a hearing on 'prisons' where evidence was deposed to by political inmates whose human rights were violated by means of heinous crimes such as murder, kidnapping and torture.[13] The 1996 Constitution of the Republic of South Africa enshrines human rights inclusive of inmates' rights. The State cannot revert to the apartheid system in the treatment of its inmates and the administration of correctional centres, despite its numerous challenges. Buntman succinctly enumerates these challenges as follows: 'South African prisons are typically overcrowded and, all too often, violent, gang-ridden, corrupt and lacking in basic health, hygiene, care or safety'.[14] Upon closer inspection, it appears as if the State is not doing much in transforming the culture of enforcing inmates' rights in its correctional centres. Thus, in

[8]Buntman (note 3 above) 402.
[9]Ibid 402 – 403.
[10]Ibid 403.
[11]Ibid.
[12]Ibid 404.
[13]Ibid.
[14]Ibid 406.

order to avoid revisiting our past, it is imperative to conduct research into the debate of South Africa's correctional centre conditions and their impact on inmates' rights. South Africa's historic tale and current scenario clearly espouses the dangers of a democratic society that entrenches human rights in the midst of correctional centres.[15]

The ancient Roman orator, Ulpian, advocated the foundational rationale for correctional centres as encapsulated in the latin maxim *carcer enim ad continendos homines non ad puniendos haberi debet* – 'The prison should be regarded as a place for the detention of people and not for their punishment'.[16]

Mubangizi enlists five primary purposes of correctional centres as rehabilitation, retribution, deterrence, incapacitation and justice.[17] The exact veracity to which these purposes are achieved, are highly controversial and subject to much legal and moral debate.[18] Generalized ideologies of the treatment of inmates are influenced by public societies' concern for their own safety and security and fears of becoming yet another statistic of increased violent crime.[19] However, an empathetic pace into evaluating the impact of correctional centre conditions on inmates' constitutional rights needs to be undertaken first before preempting retribution.

1.2. Rationale for the Study

The personal rationale for my dissertation lies at the heart of being a victim of a crime that robbed my family and I of my father, who was brutally murdered by a serial killer.[20] It took years of critical thought and constant interrogation into the minds of criminals and inmates to realise that they are in essence human beings and were once law-abiding citizens who still retain their constitutional rights. However, the sheer thought of having to preserve an inmate's life, affording him rights of food, a roof over his head, education and a second chance requires a degree of searching within the realms of retribution and forgiveness. It is natural for humans to react to

[15]Buntman (note 3 above) 415.
[16]D Van Zyl Smit *South African Prison Law and Practice* (1992) 1.
[17]J Mubangizi 'Prisons and Prisoners' Rights: Some Jurisprudential and Historical Perspectives' (2001) 14(3) *Acta Criminologica* 120.
[18]Ibid 121.
[19]L Muntingh 'Prisons in South Africa's Constitutional Democracy' CSVR Criminal Justice Programme October (2007) 5, CSVR Annual Report 2008 – 2009 1 – 9. Available at <http://www.csvr.org.za/images/annual/report09.pdf>
[20]Cederick Maake, known as the Wemmer Pan serial killer. See <http://murderpedia.org/male.M/m/maake-maoupe.htm>.

criminals by thinking that they are different and pathologically sick monsters.[21] I agree with Fattah's contention that depriving a criminal of freedom in an overcrowded correctional centre can only breed 'schools of crime' and that there is a great degree of dispensing unjust and arbitrary punishment.[22]

This concurrence elevated upon attending the Wits Justice Project's (WJP) 2011 conference on 'Remand Detention: Challenges and Solutions', where inspiration and light was shed on an inmate named Fusi Mofokeng. It was during the TRC's exoneration of an African National Congress (ANC) Self- Defence Unit (SDU) member for the murder of a policeman and attempted murder of another that Fusi Mofokeng and a co-accused had been convicted of accomplice liability.[23] Evidence revealed that the witness was influenced to tender false testimony.[24] Fusi Mofokeng was a wrongfully accused remand detainee who had spent 19 years in jail for a crime he did not commit. In this position, he was qualified to describe the correctional centre conditions as 'horrible'.[25] Fusi appealed to the Department of Correctional Services (DCS) to combat gangsterism as he had many life threatening encounters with gang members exchanging food in fear of his life.[26] Seeing the harsh reality and truth in his eyes, it dawned upon me to embark upon research that addresses and analyses the actual impact of South Africa's correctional centre conditions on inmates and the infringement of their rights.

The encounter with Fusi Mofokeng educated all the conference attendees (stakeholders) as to the plight of remand detainees and wrongfully accused individuals.[27] As has been observed: 'Most people will never see the inside of a prison or have a conversation with a prisoner regarding prison conditions, and are thus by and large dependent on media reporting on prisons and prisoners'.[28]

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[21]EA Fattah 'Is Punishment the Appropriate Response to Gross Human Rights Violations? Is a non-punitive justice system feasible?' Paper presented at the conference 'The Politics of Restorative Justice in Post-Conflict South Africa and Beyond' September (2006) Cape Town 6.
[22]Ibid 7.
[23]'An accomplice is one who takes part in the commission of the crime, but not as a perpetrator or an accessory after the fact. Accomplice liability is distinct from that of the perpetrator, being based on the accomplice's own unlawful conduct and fault (*mens rea*), but is also liability which is accessory in nature in that there can be no question of accomplice liability without the existence of a perpetrator who commits the crime'. JM Burchell *Principles of Criminal Law* 3rd ed (2005) 599.
[24]Wits Justice Project *Remand Detainees: Challenges and Solutions, Summaries and Notes* (conference attended on 10 August 2011) University of Witwatersrand 26. (Hereinafter referred to as WJP Conference).
[25]Ibid.
[26]Ibid 2.
[27]Ibid 17.
[28]Muntingh (note 19 above) 21.

My dissertation is not aimed at exemplifying and rebutting the blameworthiness of inmates as innocent victims of South African government's politics. At best, I opt to see 'eye to eye' with the Japanese criminologist Hiroshi Tsutomi who generally stated that 'People commit crimes not because they are pathological or wicked, but because they are normal' *than* to take an eye for an eye.[29]

Fattah argues in favour of restorative justice[30] as a substitution for a correctional system, by stating that this solution would eradicate the punitive 'degradation, humiliation and dehumanization' of inmates.[31] However, I would adopt a more pragmatic view in the preservation of the institution of a correctional centre. As my dissertation will illustrate, there are many challenges that inmates face which impact on their constitutional rights and South Africa's international obligations. Inmates' challenges can be addressed in a constitutional democracy that advocates forgiveness and healing of wounds. Shying away and reverting to a system, of allowing a victim to confront a perpetrator to ask 'Why me?' can never be the solution.[32] It is by no means feasible, safe or morally correct to release all of the thousands of inmates and adopt a new system entirely isolated from punitive justice.[33] This is realistically impossible. One cannot simply forgive and forget by prioritising social responsibility, prevention, mediation, reconciliation and restitution.[34] This would essentially condone their actions and encourage them to precipitate more forms of emotionally directive crimes. The notion of restorative justice should not replace the institution of correctional centres but should be incorporated and fed into the rehabilitation and restorative programmes that correctional centres offer.

The events that transpire within the four walls of a correctional centre do not remain there undetected and forgotten forever. It becomes a constituent element of an inmate's human existence when emancipated, unless these correctional centre conditions ultimately contribute to an inmate's death. Correctional officials are also witnesses to these events and are faced with a choice to either

[29]Fattah (note 21 above) 2 and 6.
[30]'In general terms restorative justice is a humanitarian approach based on the principles of forgiveness, healing, reintegration and reparation'. N Stamatakis & T Van der Beken 'Restorative Justice in Custodial Settings: Altering the Focus of Imprisonment' (2011) 24(1) *Acta Criminologica* 47.
[31]Fattah (note 21 above) 3 and 7.
[32]Ibid 15.
[33]Punitive justice simply means punishment of an offender. Fitzgerald defines punishment as 'the authoritative infliction of suffering for an offence'. J P Fitzgerald *Criminal Law and Punishment* (1959) 177.
[34]Fattah (note 21 above) 19.

adopt a sympathetic role in favour of inmates' rights or one of exploitation, bribery and corruption.[35]

1.3. Importance of a Study Critically Analysing the Impact of Correctional Centre Conditions on Inmates' Rights

The impact of correctional centre conditions on human rights is like a thread that runs through the fabric of a constitutional democracy.[36] Not only does it affect the direct infringement of inmates' rights but it delves deeper into every sphere incidental to socio-economic rights and civil and political rights. It reflects a democratic country's attitude towards addressing the problem of crime, the public's lack of concern for correctional centre conditions and the role that human rights play on the country's list of priorities.[37] These series of transgressions have holistic widespread implications for a constitutional democracy with specific regard to their international obligations.[38]

The treatment of inmates is of utmost importance in shaping the criminology, penology and sentencing mechanisms in a country.[39] Inmates have constitutional rights and States have correlative duties to enforce, protect and combat against any infringements. This relationship is essential to the vital functioning of any correctional regime.[40] States' ability to build high walls is indicative of their power to condemn crime and administer punitive measures to enforce the law.[41] Correctional centres are supposed to facilitate an inmate's redemption, rehabilitation and smooth reintegration into society and eventually prevent recidivism. The exposure of an inmate to inhumane conditions can facilitate crime amongst criminals in correctional centres, as well as provoke inmates to commit even more violent crimes upon release.[42] The position in this scenario is under constant transformation in light of the current developments.[43] Can we overlook, turn a

[35]Muntingh (note 19 above) 18.
[36]Ibid 5.
[37]R Jansen & ET Achiume 'Prison Conditions in South Africa and the Role of Public Interest Litigation since 1994.' (2011) 27 *SAJHR* 183.
[38]Muntingh (note 19 above) 23 – 24.
[39]Ibid 5.
[40]Ibid.
[41]Stamatakis & Van der Beken (note 30 above) 44 – 45.
[42]Ibid 45 – 46.
[43]As discussed below in the problem statement, see the case of *The Minister of Correctional Services v Lee* [2012] ZASCA 23 (23 March 2012) (316/11) and *Lee v The Minister of Correctional Services* 2013 (2) SA 144 CC/ CCT20/2012 ZACC 30.

blind eye or ignore the impact of correctional centre conditions on inmates' human rights in a constitutional democracy? [44]

In essence, I intend to turn these key challenges as mentioned above, into opportunities for inmates to contribute to making South Africa a better country. Conclusions will be drawn from all the resources consulted, to present a meaningful piece of work that contributes to the plight of inmates' rights. My conclusions will serve as a single attempt to provide guidelines towards improving South Africa's correctional centre conditions. It will validate the debate as one of concern and priority for a democratic country that prides itself on its constitutional values of human dignity, equality and freedom.[45]

1.4. Problem Statement

> We are aware of all the inconveniences of prison, and that it is dangerous when it is not useless. And yet one cannot 'see' how to replace it. It is a detestable solution, which one seems unable to do without.[46]

The problem of overcrowding and various other correctional centre conditions or abuses has been firmly rooted since 1823, in the Cape Colony.[47] These very same problems penetrate into South Africa's current correctional centres.[48] The first watershed case identifying inmates' human rights was that of *Whittaker v Governor of Johannesburg Goal*.[49] The Court simply ruled that inmates awaiting trial were not to be subjected to unnecessary ill-treatment and were dually entitled to approach the court for appropriate relief.[50] Therefore, one of the objectives of my dissertation is to prove that correctional centre conditions affecting inmates' human rights remain a problem that requires progressive development towards realistically finding a workable solution in curbing and managing the number of inmates being housed in South Africa's correctional centres today.

The conundrum of inmates' rights lies at the heart of the Constitution. The watershed Constitutional Court case of *S v Makwanyane* irrevocably abolished the institution of the death

[44]Muntingh (note 19 above) 5.
[45]The Constitution s 7(1).
[46]M Foucault *Discipline and Punish: The Birth of the Prison* (1975) 232.
[47]Mubangizi (note 17 above) 125.
[48]*Whittaker v Governor of Johannesburg Goal* 1911 WLD 139.
[49]Ibid.
[50]Ibid.

penalty, despite public outcry.[51] It appears that five justices on the full bench reasoned the preservation of the right to life by virtue of the South African spirit of *ubuntu*.[52] The spirit of *ubuntu* underpins a constitutional democracy. In South Africa, the right to life and human dignity[53] are protected as non-derogable rights in the Constitution. Do these rights and other human rights extend to inmates or do they cease to exist upon admittance into a correctional centre?

Following this line of precedent in the *Hofmeyr* case regarding the *residuum* principle of inmates' rights[54] (as discussed later), few reported cases have emerged from the SCA and the High Courts to enforce inmates' rights. Before 28 August 2012, to inmate's dismay, correctional centre conditions in South Africa did not reach the Constitutional Court. The Constitutional Court adopted a non-interventionist approach.[55] This position has changed. Now, there appears to be a beacon of hope for the enforcement of inmates' rights. Public interest litigation can possibly harmonise constitutional rights, legislation and new judicial precedent.[56] The *Lee*[57] case deals with transmission of tuberculosis in a correctional centre and the State's duties in relation to healthcare. This judgment's advent at the Constitutional Court serves as South Africa's first revolutionary step to enforce inmate's human rights in a constitutional democracy and my dissertation seeks to document, analyse and appreciate such findings.

During the 37th Ordinary session of the African Commission on Human and Peoples' Rights, Vera Chirwa (then Special Rapporteur on Prisons and Conditions of Detention in Africa who had visited South Africa's correctional centres), presented her mission report on conclusions and recommendations in relation to correctional centre conditions and treatment of inmates in South Africa.[58] She identified five major challenges - gangsterism, overcrowding, poverty, lack of community involvement and corruption.[59] Chirwa's observations serve to reinforce my debate on correctional centre conditions. It appears that upon inspection of her recommendations that were

[51]*S v Makwanyane* 1995 (3) SA 391 (CC), I Currie and J de Waal *The New Constitutional and Administrative Law* Vol 1 (2001) 65.
[52]Burchell (note 23 above) 87 – 89.
[53]The Constitution s 11 and s 12.
[54]*Minister of Justice v Hofmeyr* 1993 (3) SA 131 (A) 141G – H.
[55]Van Zyl Smit (note 16 above) 67 – 68.
[56]Jansen & Achiume (note 37 above) 189 – 190.
[57]*Lee v The Minister of Correctional Services* 2013 (2) SA 144 CC/ CCT20/2012 ZACC30.
[58]VM Chirwa *Report of the Special Rapporteur on Prisons and Conditions of Detention in Africa: Mission to the Republic of South Africa* 37th Ordinary Session 14 – 30 June 2004, 2. Available at <http://www.achpr.org/states/south-africa/missions/prisons-2004/>.
[59]Ibid 52 – 57.

posited in 2004, to date (twelve years later) none of these recommendations have been fully implemented.[60] Further investigation into the *McCallum*[61] and *Lee* cases evidenced that in addition to the aforementioned problems highlighted by the Special Rapporteur, sexual violence and access to healthcare facilities were critical conditions that inmates face in the violation of their rights. Thus, upon further research, my dissertation is specifically tailored to exploring three problems of: overcrowding; gangsterism and sexual violence; and, access to healthcare facilities. These specific three problems impact on specific inmates' rights. My dissertation undertakes a critical analysis to demonstrate the extent of such impact. The rationale for identifying the three aforementioned conditions is the severity of the extent of the impact that these three correctional centre conditions have on inmates' rights. The existing literature, judicial precedent, current statistics and trends lean towards identifying the three aforementioned conditions as critical conditions that impact on inmates' rights as detailed in the literature review below.

1.5. Objectives

My dissertation aims to fulfil the following objectives:

1. Identify three key current correctional centre conditions that South Africa's correctional centres face and critically analyse the extent of the impact that the conditions have on inmates' rights.
2. Investigate the extent of South Africa's compliance with its international human rights obligations to protect and enforce inmates' rights. The findings of this investigation will establish a threshold of contravention that will illustrate the extent of the impact that South Africa's correctional centre conditions have on inmates' rights.
3. Critically evaluate the extent of the State's accountability in relation to South Africa's current correctional centre conditions and their infringement on inmates' rights.
4. Critically evaluate the need for enforcing inmates' rights in South African courts, more specifically a Constitutional Court judgment that rules on the impact of correctional centre conditions on inmates' rights. This will necessitate unpacking and analysing the reasoning in reported and unreported cases in the SCA and High Courts that have addressed the impact of

[60]Chirwa (note 58 above) 63 – 67.
[61]*Bradley McCallum v South Africa* (McCallum represented by counsel, Egon Aristidie Oswald) 25 October 2010 CCPR/C/100/D/1818/200. (Hereinafter referred to as *Bradley McCallum*).

correctional centre conditions on inmates' rights. Their outcomes will be compared and contrasted to highlight the bearing that a Constitutional Court judgment will have in setting a precedent for the protection of inmates' rights.

5. Postulate recommendations for reform of South Africa's correctional centre conditions in line with international standards, to circumvent the violation of inmates' rights.

1.6. Research Questions

It follows directly from the problem statement and objectives that my dissertation aspires to answer the following research questions:

1. What is the impact of South Africa's correctional centre conditions on inmates' rights in a constitutional democracy?
2. What is the extent to which South Africa's correctional centre conditions comply with the State's international human rights obligations?
3. Can the State be solely responsible for the violation of inmates' rights? If so, on what grounds?
4. What recourse do inmates have for violations of their rights?
5. What can be done to improve correctional centre conditions in South Africa, so as not to infringe upon inmates' human rights?

1.7. Terminology

In the context of my dissertation, the following plain language definitional interpretation of the concept of correctional centre condition(s) must be made. The singular definition of a *condition* is 'the physical state of something (person or animal)'.[62] Whereas the plural definition of *conditions* is, 'the situation or environment in which something happens or exists', 'the environment in which people must live', 'life and the situations that people must deal with, especially when it is difficult' or 'an illness or health problem that lasts a long time and affects the way you live'.[63]

It is arguable that the 'physical state' of South Africa's correctional centres are overcrowded. This is a single condition, the root cause of all other correctional centre conditions. The focus of my

[62]*Macmillan Dictionary* Condition(s) Definition Available at <http://www.macmillandictionary.com/dictionary/british/condition>.
[63]Ibid.

dissertation is not on the isolated correctional centre condition of overcrowding only but on an all-inclusive plural definition of correction centre conditions. This distinction is important because there are numerous correctional centre conditions that can be discussed. The very nature of correctional centre conditions are their innate interconnectedness. Attempts to compartmentalise and draw clear-cut lines between correctional centre conditions prove to be impossible.

Gangsterism and sexual violence are seen as 'phenomenon' in various writings.[64] The definition of a *phenomenon* is 'a fact or situation that is observed to exist or happen'.[65] This is related to the plural definition of *conditions,* 'the situation or environment in which something happens or exists'.[66] Furthermore, the other two definitions of *conditions* as mentioned above namely 'life and the situations that people must deal with, especially when it is difficult' or 'an illness or health problem that lasts a long time and affects the way you live'[67] can relate more suitably to gangsterism and sexual violence as conditions as opposed to a phenomenon. Gangsterism and sexual violence are the situations that inmates must deal with especially when it is difficult (conditions). Where an inmate contracts HIV and AIDS for example from a gang related or sexually violent incident, it becomes an illness or health problem that lasts a long time and affects the way an inmate lives (conditions). Gangsterism and sexual violence as a phenomenon that is observed to exist or happen cannot fully give meaning to the effect that gangsterism and sexual violence has on inmates' human rights. Thus, the classification of gangsterism and sexual violence as correctional centre *condition(s*) would be more appropriate terminology than *phenomenon* in the context of my dissertation.

Therefore, in the context of my dissertation, I draw upon the latter plural definition of correctional centre conditions, which is all incumbent of the environment, lifestyle, circumstances and challenges that inmates face. I deal with the following correctional centre conditions only due to the vast array of challenges that inmate's face in relation to them: overcrowding; gangsterism and sexual violence; and access to healthcare facilities. The aforementioned correctional centre

[64]Penal Reform *International Global Prison* Trends (2015) 5. Available at < https://www.penalreform.org/wp-content/uploads/2015/04/PRI-Prisons-global-trends-report-LR.pdf> 'The incidence of gangsterism and use of drugs in correctional centres is a global phenomenon'.
[65]*Oxford Dictionary* Phenomenon Definition Available at <https://en.oxforddictionaries.com/definition/phenomenon>
[66]*Macmillan Dictionary* Condition(s) Definition (note 62 above).
[67]Ibid.

conditions are tailored to inmates' correlative constitutional rights in the context of my dissertation.

The Correctional Services Act[68] as amended by the Correctional Service Amendment Act 25 of 2008[69] deleted the use of the terms 'prison' and 'prisoner' and substituted these terms with 'correctional centre'[70] and 'inmate'[71] respectively.[72] The change in terminology is one of the indicators that the legislature is trying to make a concerted effort in removing the stigma of being an inmate locked away in a correctional centre. This endeavor reverts to the constitutional values of trying to balance and limit rights simultaneously. Thus, I will use the Correctional Services Act terminology as amended in my dissertation, which is specifically framed in the South African context. This will ensure consistency and politically correct terminology aligned to the current South African legislation. However, where quoting directly, alternative terminology (indicated below) as used in the quoted source is retained.

Correctional centre – prison, cell, jail, penitentiary, custody or detention centre.

Inmate - prisoner, convicted persons, arrested, detained and accused persons,[73] remand detainee,[74] awaiting trial prisoner.

Incarceration – imprisonment.

Therefore, it is imperative to emphasise that the use of each of the aforementioned terms are context specific.

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[68]Correctional Services Act No. 111 of 1998. (Hereinafter referred to as the Correctional Services Act).
[69]Correctional Services Amendment Act No. 25 of 2008.
[70]Ibid. s 1 defines 'correctional centre'- 'means any place established under this Act as a place for the reception, detention, confinement, training or treatment of persons liable to detention in custody or to placement under protective custody, and all land, outbuildings and premises adjacent to any such place and used in connection therewith and all land, branches, outstations, camps, buildings, premises or places to which any such persons have been sent for the purpose of incarceration, detention, protection, labour, treatment or otherwise, and all quarters of correctional officials used in connection with any such correctional centre, and for the purpose of sections 115 and 117 includes every place used as a police cell or lock-up' (Definition inserted by s 1(e) of Act No. 25 of 2008).
[71]Ibid. s 1 defines 'inmate'- 'means any person, whether convicted or not, who is detained in custody in any correctional centre of remand detention facility or who is being transferred in custody or en route from one correctional centre or remand detention facility to another correctional centre or remand detention facility'. (Definition inserted by s 1 (j) of Act No. 25 of 2008 and amended by s 1(a) of Act No. 5 of 2011).
[72]Definition of 'prison' deleted by s 1(p) of Act No. 25 of 2008) and definition of 'prisoner' deleted by s 1(q) of Act No. 25 of 2008).
[73]Jargon used in s 35 of the Constitution.
[74]As defined in s 1 of the Correctional Services Act and later discussed in Chapter 3.

A clear separation of three very important groups of inmates must be delineated, namely: sentenced offenders, unsentenced offenders and remand detainees. The Correctional Services Act clearly defines each of the enumerated concepts. A sentenced offender is a 'convicted person sentenced to incarceration or correctional supervision.'[75] Whereas, an unsentenced offender is 'any person who is lawfully detained in a correctional centre and who has been convicted of an offence, but who has not been sentenced to incarceration or correctional supervision.'[76] A remand detainee on the other hand is 'a person detained in a remand detention facility awaiting the finalisation of his or her trial, whether by acquittal or sentence, if such person has not commenced serving a sentence or is not already serving a prison sentence; and includes a person contemplated in section 9 of the Extradition Act 67 of 1962, detained for purposes of extradition.'[77] The aforementioned definitions will be used in my dissertation as defined in the Correctional Services Act as amended.[78]

1.8. Literature Review

My research reveals that there is a great deal of literature by South African experts in this sphere.[79] The majority of these writings identify specific correctional centre conditions, highlighting overcrowding as a fundamental problem. Some adopt qualitative studies and others quantitative. Every one of these writers unveils the harsh correctional centre conditions, which appears to be a universal problem that all correctional centres face worldwide. The common criminological trend is to introduce the problem by archiving statistics, give personal accounts of inmates or data that reflects how poor the state of South African correctional centre conditions are and then proceed to make suggestions. I argue that the reality of correctional centre conditions and their infringement on inmate's rights is overburdened with infinite challenges upon challenges. There is virtually no

[75]Correctional Services Act s 1 under Definitions.
[76]Ibid.
[77]Ibid. 'Remand detention facility' 'means a place established under this Act as a place for the reception, detention or confinement of a person liable to detention in custody, and all land, branches, outstations, camps, buildings, premises or places to which any such persons have been sent for the purpose of detention, protection, treatment or otherwise, and all quarters used by correctional officials in connection with any such remand detention facility, and for the purpose of sections 115 and 117 includes every place used as a police cell or lock-up' [Definition of 'remand detention facility inserted by s. 1 (c) of Act No. 5 of 2011.]
[78]Correctional Services Act No. 111 of 1998 as amended by Correctional Services Amendment Act No. 25 of 2008.
[79]These experts include: Ballard C, Dissel A, Gear S, Jansen R & Achuime TE, Robertson S et al, Kollopen J, Kriel J, Luyt WFM, Mubangizi J, Muntingh L, Satardien Z, Peacock R & Theron A, Sarkin J, Singh S, Stamatakis N, Steinberg J, Stern V, Van der Berg A and Van Zyl Smit D. This list is not exhaustive; however, specific reference to the aforementioned experts work will be drawn upon as fully cited in the annotated bibliography below.

one solution to fully eradicate and uproot these weeds growing in our democracy. DCS requires the participation of the public and various other stakeholders, as space, funding and skilled officials remain obstacles in realising and upholding their values of development, integrity, recognition of human dignity, efficiency, accountability, justice, security and equity.[80]

Key points from the literature review on the three correctional centre conditions identified in the problem statement above, are briefly introduced below and further detailed in this dissertation. There is a need to keep abreast with South Africa's growing legal implications on the human rights of inmates in its infancy as a constitutional democracy.[81] It is thus my prerogative to make a concerted effort to contribute to the existing literary work and research in this sphere of law.

1.8.1. Overcrowding

Since 1993, correctional centres experienced severe overcrowding. A swift escalation in numbers with the effluxion of time evidenced a surcharge of inmates.[82] For example, the 2010/2011 report of the Judicial Inspectorate of Correctional Services (JICS/Judicial Inspectorate) revealed that there were 241 operational correctional centres in South Africa.[83] The joint capacity of these centres could only hold 118 154 inmates at the time, but it was documented that as at 31 March 2011, 160 545 inmates were housed.[84] Of these 160 545 inmates, 47 880 inmates were remand detainees and the remaining 112 683 were sentenced offenders.[85] This essentially meant that, close to a third (29, 82%) of the total population were remand detainees.[86] More recent statistics and trends have been extrapolated later in chapter three. These statistics further revealed that the most number of inmates are detained in Gauteng with the highest level of overcrowding at 249.62%.[87] Johannesburg Medium A, for example, has a capacity of 2 630 inmates and held 6 118 remand

[80]Annual Report of the Department of Correctional Services (2010/2011) 6-7. Available at <http://www.dcs.gov.za/Publications/AnnualReports.aspx> (Hereinafter referred to as DCS Annual Report of the specific financial year as all the reports have been accessed from this same website).
[81]Annual Report of the Department of Correctional Services (2010/2011) 6.
[82]Jansen & Achiume (note 37 above) 185.
[83]Judicial Inspectorate for Correctional Services Annual Report (2010/2011) 10. Available at <http://judicialinsp.dcs.gov.za/Annualreports/annualreport.asp> (Hereinafter referred to as JICS Annual Report of the specific financial year as all the reports have been accessed from this same website).
[84]Ibid 11.
[85]Ibid.
[86]Ibid.
[87]Ibid 13.

detainees and only 150 sentenced offenders evidencing a 238.33% capacity.[88] The crux of the remand detainee numbers lie in Gauteng with 37.47% exceeding the three month mark.[89]

The problem of overcrowding spills over and amasses many related problems directly affecting infrastructure and limited resources. These essentials include toilets, sanitation, beds, blankets, lighting, air and space.[90] The inspecting judge has verified the severe correctional centre conditions that have resulted from overcrowding. These include but are not limited to the following instances: 21 correctional centres are not in a position to use utensils during mealtimes, insufficient beds force inmates to sleep on concrete, strip searches rob inmates of their privacy, the rate of contagious diseases spread like wildfire and educational materials are limited if not available at all.[91] It is arguable that strip searches are routinely conducted in correctional centres, however, due to overcrowding, the security searches are more stringent and done openly in the midst of many on-looking inmates.

1.8.2. Gangstgerism and Sexual Violence

Correctional centres are plagued with gangs that have been historically formulated and categorised. Common designations as stated by Dissel are the 26's, 27's and 28's, tailored for members who commit specific types of crimes and one of the most dangerous crime amongst criminals in correctional centres are the various forms of sexual violence.[92] Gang members utilise rape as ammunition to gain status and control in correctional centres. As Muntingh and Saterdien indicate, individuals who are young, weak, new and naïve to correctional centre life are targeted.[93] The occurrence of gangsterism in correctional centres, since the end of World War II, has infected all continents.[94] So, it is safe to say that South Africa does not have exclusivity to gang trends. Sex

[88]Annual Report of the JICS (2010/2011) 13.
[89]Ibid 14.
[90]South African Human Rights Commission *Report of The National Prisons Project of the South African Human Rights Commission* 29 August 1998 12 – 13. Available at <http://www.sahrc.org.za> (hereinafter referred to as SAHRC *Report of the National Prisons Project of the South African Human Rights Commission*).
[91]L Muntingh 'The Prison System' in C Gould *Criminal (In) justice in South Africa: A Civil Perspective* (2009) 201, 208-9
[92]A Dissel 'South Africa's Prison Conditions: The Inmates Talk' (1996) 2 *Imbizo* 4, 7.
[93]L Muntingh & Z Satardien 'Sexual Violence in Prisons - Part 1: The Duty to Provide Safe Custody and the Nature of Prison Sex' (2011) 24 Issue 1 *SAJC* 2 – 3.
[94]BE Van Wyk & WH Theron 'Fighting Gangsterism in South Africa: A Contextual Review of Gang and Anti-Gang Movements in the Western Cape' (2005) 18 (3) *Acta Criminologica* 51.

by consent and coercion are used as a form of bartering, or money. Many other uses of sex exist in correctional centres namely: sex in correctional centres marriages, rape and the display of casting gender roles.[95]

1.8.3. Access to Healthcare Facilities

A higher degree of care should be afforded to inmates: '[U]nlike persons who are free, prisoners have no access to other resources to assist them in gaining access to medical treatment'.[96] Access to medical facilities are restricted and are usually available to inmates when their 'conditions turn severe'.[97] Due to overcrowding, there is a lack of medication and treatments. The department is overburdened with patients and has a shortage of doctors, nurses, dentists, social workers and psychologists.[98] The SAHRC reported that inmates were given expired medication and there was a major problem with regard to medical staff.[99] The Annual DCS Report reveals that there are a number of vacant posts for medical professionals that are yet to be filled.[100] This is a matter of great concern as exemplified in the recent *Lee* judgment.[101]

Correctional centres can be viewed as 'incubators' for the transmission of HIV, tuberculosis and sexually transmitted diseases.[102] Inmates either enter correctional centres with HIV or acquire it during their sentence duration. Many die in correctional centres at the hands of the State. Muntingh and Tapscott estimate that the prevalence of the HIV rate in correctional centres are reaching the tiers of the general populations infection rates.[103] HIV and AIDS is commonly transmitted via sexual intercourse, the use of needles for drugs and the sharing of razor blades. However, the gang culture of tattooing is another unique form of transmission.[104] It can be argued that when inmates

[95]Muntingh & Satardien (note 93 above) 13 – 15.
[96]*B v Minister of Correctional Services* 1997 All SA 574 (C) 590 para 54.
[97]Jansen & Achiume (note 37 above) 187.
[98]S Singh 'Towards Conceptual Clarity of Incarceration and Rehabilitation within the South African Criminal Justice System' (2008) 2 *Acta Criminologica* 59, 69.
[99]SAHRC *Report of the National Prisons Project of the South African Human Rights Commission* (note 90 above) 12 – 13.
[100]DCS Annual Report (2010/2011) 23.
[101]*Lee v The Minister of Correctional Services* CCT20/2012.
[102]L Muntingh & C Tapscott 'HIV/AIDS and the Prison System' in P Rohleder et al (eds) *HIV/AIDS in South Africa 25 Years On* (2009) 305(Accessed from Springer).
[103]Ibid 306.
[104]Ibid 307 – 308.

are educated on the implications of HIV and AIDS, they are still in a precarious environment, where resources are inadequate and they remain at risk.

1.9. Scope and Limitations

One of the primary limitations posed in my dissertation is delving into each and every correctional centre condition and its impact on all inmates' rights. A study of that disposition would go beyond the scope and literature review of my dissertation. Therefore, the scope of my dissertation is limited to the three correctional centre conditions of overcrowding, gangsterism and sexual violence, and access to healthcare facilities and their impact on inmates' rights as canvassed in chapter two of this dissertation.

The correctional centre population consists of various categories namely: 'age, gender, sentence status, sentence length, health, sexual orientation, gang affiliation, disability, mental health and so forth.'[105] It is a fact that 98% of the inmate population comprises of males.[106] Women are a vulnerable marginalised minority.[107] Interestingly, overcrowding in female correctional centres is not a major challenge as compared to male populations.[108] Luyt and Du Preez's research on female inmates revealed that most of the female inmates were first time offenders who commit fewer violent crimes than males and majority of these female inmates are mothers with children.[109] Thus, for purposes of my dissertation, focus is placed on male sentenced offenders and remand detainees only. The debate surrounding the various categorical inmates that exist in modern correctional centres in relation to their respective rights is excluded from this dissertation. Thus, I do not delve into the various categories of inmates, more specifically female and youth offenders, as this would be a cumbersome exercise and descriptively tarnish the crux of my debate.

Due to the vast array of existing literature in the corrections sphere, a limitation posed is the analysis of every single piece of literature written on correctional centre conditions and human

[105]Muntingh (note 19 above) 9.
[106]WFM Luyt & N du Preez 'A Case of Female Incarceration in South Africa' (2010) 23(3) *Acta Criminologica* 88 – 89.
[107]Ibid.
[108]Ibid 93.
[109]Ibid 96 – 98.

rights. Therefore, I present a dissertation that encapsulates my arguments and key focus areas that I describe and critically analyse within the mass of existing literature.

My dissertation will be limited to international and regional instruments with particular attention to treaties to which South Africa is a party to by virtue of ratification as well as standards established by the United Nations Human Rights Committee and the African Commission on Human and Peoples' Rights.

Another limitation posed is the accessibility to reliable statistics regarding the three correctional centre conditions as not every incident that occurs in correctional centres are documented in the DCS and JICS reports. Rape, gang violence and patients infected with HIV and AIDS for instance are not all formally reported as detailed in the dissertation.

1.10. Methodology

My dissertation adopts a textual, archival and desktop methodology. The technique of dissertation writing adopted was predominately descriptive, analytical and argumentative. Primary and secondary sources were utilised. The primary resources included UN and African regional human rights treaties, the Constitution, legislation, judicial and quasi-judicial precedent. JICS reports, DCS reports and State commissioned reports were analysed to extract current available statistics and pertinent issues. The contents of vast amounts of secondary sources that deal directly or indirectly with South African correctional centre conditions and its impact on inmates' human rights have been canvassed in the chapters to follow. These include various books, chapters in books, journal articles, research reports, dissertations, internet resources and government websites. Reference to speeches, notes, papers and summaries of conferences that I attended in the course of my research, are also drawn upon in the context of this dissertation. The secondary sources presented are not limited to South Africa, and international sources are drawn upon in purview of South Africa's correctional centre conditions.

In illustrating the impact that South Africa's correctional centre conditions have on inmate's rights, direct references are made to international and regional instruments (concerning correctional centre conditions and inmates' rights) to gauge the extent of South Africa's compliance thereto. Evidence of this nature will prove to reinforce my research as one of global concern.

Where relevant, international case law in the context of my dissertation is scrutinised. Therefore, my dissertation is not limited to drawing upon international jurisprudence of a single country in relation to South Africa, as it is not intended to be a single limited comparative study. Reference to specific international countries' jurisprudence is made and solely dependent on its relevance to substantiating specific issues in my research.

It is imperative to aver that there has been a transformation in the international realm of jurisprudence, which has recently ushered in the new 'United Nations Standard Minimum Rules for the Treatment of Prisoners' also known as the 'Nelson Mandela Rules'.[110] I seek to capture the essence of this revolutionary advent of the Nelson Mandela Rules in the context of the debates that follow in my dissertation by drawing upon the various new rules that are privy to South Africa's Constitutional democracy.

In addition to desktop research, 'informal' discussions with experts to seek opinion, advice, clarity and information were periodically conducted. I consulted with various non-governmental organisations who have provided me with their research reports, unpublished material and expert knowledge. Furthermore, I had discussions with various other experts who assisted me with sourcing reliable resources. The experts were from higher education institutions, government departments, criminal justice organisations, research councils, charitable foundations and local multi-agency partnerships. I also consulted with authors of publications, criminologists, inmates' rights activists, attorneys, advocates, independent visitors, warders, doctors, nurses, psychologists, journalists and even faith groups. These informal discussions aided in striking a balance between the theoretical aspects of desktop research and the practical reality of my topic. No records of these discussions were documented in this dissertation but were relevant in informing the research in a general sense.

Furthermore, I draw upon correctional centre visit reports by the Constitutional Court justices. This is a new institution established by the Constitutional Court in 2010. The Court's justices have

[110]United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) adopted unanimously by the 70th session (70/175) of the UN General Assembly in Resolution on 17 December 2015 in Resolution A/RES/70/175 http://www.penalreform.org/resource/standard-minimum-rules-treatment-prisoners-smr/. These Rules revised the Standard Minimum Rules for the Treatment of Prisoners, adopted Aug. 30, 1955 by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, U.N. Doc. A/CONF/61. (Hereinafter referred to as the Nelson Mandela Rules).

been divided and designated to specific correctional centres in different areas around the country. Their task is to visit these correctional centres and report on the state of correctional centre conditions.[111] As this is a new development in the sphere of penology, there has been limited literature documenting and analysing these reports, I also refer to these Constitutional Court reports in my dissertation to illustrate the importance of the Constitutional Court justices' findings.

1.11. Chapter Outline

My dissertation is divided into five chapters exclusive of this chapter which has laid the foundation of this dissertation and has provided the reader with rationale for the research.[112]

Chapter two critically identifies and evaluates the rights that inmates are entitled to as informed by the Constitution, statutory, regional (African) and international (UN) law.[113] These rights are tailored to the three aforementioned correctional centre conditions.

The next three chapters critically analyse the extent of the impact of South Africa's correctional centre conditions on inmates' rights as canvassed in chapter two. It demonstrates the extent to which South Africa conforms to its constitutional rights and international obligations. These three chapters each deal specifically with the following three correctional centre conditions and their impact on inmates' rights: overcrowding (chapter three), gangsterism and sexual violence (chapter four) and access to healthcare facilities (chapter five).

Chapter six undertakes a critical analysis of the observations drawn in the aforementioned chapters in order to holistically draw conclusions. In this chapter, I offer practical recommendations for reform of South Africa's correctional centre conditions in line with international standards, to circumvent the violation of inmates' rights. I also map out the recourse that an inmate has for violations of his human rights.

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[111]Constitutional Court Prison Visits Available at <http://www.constitutionalcourt.org.za/site/PrisonVisits/PrisonVisits.htm#prisonvisitsreports> and <http://www.constitutionalcourt.org.za/site/PrisonVisits/PrisonVisits.htm> in terms of s 99(1) and (2) of the Correctional Services Act, WJP Conference (note 24 above) 26 and JICS Annual Report of (2010/2011) 36.

[112]The chapters that follow have a distinct thread interspersed throughout my dissertation. Due to the interdependent nature of each chapter, I often have to refer back to the preceding or succeeding chapter to relay the argument. This endeavor has been adopted to avoid repetition of my arguments.

[113]More specifically African Regional Law and United Nations instruments.

1.12. Conclusion

The historical background has demonstrated that the institution and purpose of a correctional centre have been fraught with challenges since the apartheid era. The protection of inmates' rights lies at the heart of the Constitution. The Constitution is the Supreme law of South Africa that enshrines the rights of equality, human dignity and freedom to all people including inmates.

This chapter has established the foundation and need for a study that critically analyses the impact of South Africa's correctional centre conditions on inmates' rights. It has mapped out the rationale and objectives for my dissertation. The chapter has limited the scope of the study by identifying three correctional centre conditions as: overcrowding; gangsteriam and sexual violence; and access to healthcare facilities. Definitions and interpretation of relevant concepts in the context of my dissertation have also been extrapolated in the chapter. The extent of the impact that South Africa's correctional centre conditions have on inmates' rights is unlocked in the next five chapters.

CHAPTER 2: INMATES' RIGHTS AS INFORMED BY INTERNATIONAL, REGIONAL, CONSTITUTIONAL AND STATUTORY LAW

2.1. Introduction

> Most prisoners come from the poor, minority groups, the uneducated, the unemployed, the mentally ill. The prison is the magnifying mirror which reflects and enlarges the unresolved social problems of the society which it serves.[114]

The definition of the term 'right' can be noted as a legal or moral entitlement, a just and fair privilege that is protected by law and the infringement of this claim is viewed as immoral or an injustice.[115] The interplay between rights and duties follow as duties flow from rights. Thus, rights are collectively coupled with correlative responsibilities and obligations.[116] It is imperative to assess the origins of a right to determine their enforceability. Enforceable rights are those that are capable of constitutional scrutiny in a court of law. The Latin maxim succinctly qualifies this: *ubi ius ubi remedium* – where there is a right, there is a remedy. It is then understandable to a layman that when his right is infringed upon, he may approach an appropriate court of law to seek relief in his matter.[117] Thus, inmates have rights, but the real heart of my debate lies at the anterior end of the maxim, do they have any remedies available to them when there is a violation of their rights?

In mapping out what inmates' rights are, I draw upon international (UN), African regional and South African national instruments, more specifically the constitution and legislation. The chapter also maps out the rights in relation to the relevant correctional centre conditions identified.

It should be emphasised that the focus of my dissertation is limited to the rights canvassed below. Thus, the focus will be channeled to accommodate a scholarly debate on the identifiable rights that correlate to specific conditions as discussed in chapters three, four and five.

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[114]V Stern *Sin against the Future: Imprisonment in the World* (1998) 114.
[115]J Omar 'A Prisoner's Right: The Legal Case for Rehabilitation' September (2011) 37 *South African Crime Quarterly* (Institute for Security Studies) 19.
[116]Ibid.
[117]Ibid 19 - 20.

2.2. Brief Historical Background of Inmates' Rights

The origins of correctional centres in South Africa date back to the apartheid era. This era was haunted by racism, which favoured the use of incarceration as a weapon of mass destruction to lull the inmate into believing that, due to the colour of his skin, his rights ceased to exist. Thus, there was no need for any protection of non-existent rights.[118]

South African correctional centres were physically built to accommodate the vicious cycle of the apartheid regime. Some of the correctional centres' architectural appearances may still influence the modern-day concept of fostering human rights amongst inmates.[119] Thus, our correctional centres today need to be fully operational in accordance with the spirit, purport and objects of the Bill of Rights, so as to detract from reverting to a system that dehumanised and arbitrarily violated the rights of inmates.[120]

Subsequent to the *Whittaker* case mentioned in chapter one, in the case of *Goldberg*, Corbett JA in a dissenting judgment emphasised that '…a convicted and sentenced prisoner retains all the basic rights and liberties ….[T]here is a substantial residuum of basic rights which he cannot be denied, and if he is denied them, then he is entitled, in my view to, legal redress'.[121] Commonly referred to as the *residuum* principle, a unanimous bench enforced its application in the *Hofmeyr* case at the inception of the establishment of South Africa's constitutional democracy.[122] Consequently, inmates' rights in South Africa have been in existence since 1911 and this legacy has been codified into the present generation's constitution.

2.3. Inmates' Rights as informed by International Instruments

The Constitution states that when interpreting the Bill of Rights, a court 'must consider international law'.[123] Furthermore, when interpreting legislation, 'every court must prefer any

[118]Muntingh (note 19 above) 6.
[119]Ibid.
[120]Ibid and s 39 (2) of the Constitution.
[121]*Goldberg v Minister of Prisons* 1979 (1) SA 14 (A) 36.
[122]*Minister of Justice v Hofmeyr* 1993 (3) SA 131 (A) 141G – H.
[123]The Constitution s 39(1) (c).

reasonable interpretation of the legislation that is consistent with international law'. [124] International law thus plays a crucial role in South Africa's legal order.

The *Makwanyane* case explains that section 231 of the Constitution canvasses the requirements for 'customary international law and the ratification and accession to international agreements' to be binding in South Africa and that that 'public international law' would comprise of both binding and non-binding law, which provides guidelines for interpreting the Bill of Rights. The United Nations Human Rights Committee's jurisprudence, for example, can assist in the interpretative guidance of constitutional provisions. [125] Soft law is classified as non-binding standards or declarations that hold persuasive value.[126]

This dissertation considers the International Covenant on Civil and Political Rights (ICCPR),[127] the International Covenant on Economic, Social and Cultural Rights (ICESCR)[128], the Standard Minimum Rules for the Treatment of Prisoners (SMR),[129] the revised 122 Rules of the United

[124]S 233 of the Constitution. There are other provisions in the Constitution that speak to International Law as canvassed below. s 231. **'International agreements** (1) The negotiating and signing of all international agreements is the responsibility of the national executive. (2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection 3. (3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time. (4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an act of Parliament. (5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect'. s 232. **'Customary international law** Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.' s 37 (4)(b)(i) 'the legislation- is consistent with the Republic's obligation under international law applicable to states of emergency'. *S v Makwanyane* 1995 (3) SA 391 (CC) is the key to justifying the importance of international law in South Africa (both binding and non-binding) in the interpretation of the Bill of Rights and legislation.

[125]*S v Makwanyane* (note 51 above) para 35. See *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000) para 26 – 31.

[126]J Dugard, M Du Plessis, A Katz & A Pronto *International Law: A South African Perspective* (2011) 33 – 34.

[127]International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No.16) 52, U.N.Doc.A/6316 (1967). Available at <http://www.iccppc.org/region_africa/docs/african_charter01.htm>, http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx. South Africa signed the treaty on 3 October 1994 and it was ratified on 10 December 1998.

[128]International Covenant on Economic, Social and Cultural Rights, Adopted and opened for signature, ratification and accession by the General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 1976, in accordance with Article 27. Available at www.ohchr.org/sp/professionslinterest/pages/cescr.aspx South Africa signed the treaty on 3 October 1994 and it was ratified on 18 January 2015.

[129]Standard Minimum Rules for the Treatment of Prisoners, adopted Aug. 30, 1955 by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, U.N. Doc. A/CONF/61. Available at http://www.unodc.org/pdf/criminal_justice/UN_Standard_Minimum_Rules_for_the_Treatment_of_Prisoners.pdf

Nations Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules) adopted by the UN General Assembly in December 2015[130] and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).[131] The aforementioned international instruments are directly pertinent to this dissertation. A study into all international instruments in this field would go beyond the scope of my dissertation.

It is clearly demarcated in Article 10 of the ICCPR that '[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person'. This categorisation emphasises that irrespective of any person's repression of liberty, they still have rights to be treated in a humane manner. Article 6 of the ICCPR guarantees the right to life and survival. Article 14 emphasises the right to equality and the infamous 'innocence until proven guilty' clause. These international rights to dignity, life and equality are echoed in the Constitution of the Republic of South Africa, more specifically detailed below.

Numerous articles in the ICESCR also have a bearing on inmates' rights. The Preamble to the ICESCR clearly recognises the 'inherent dignity of a human person'. Article 11 recognises 'the right of everyone to an adequate standard of living for himself…including adequate food, clothing and housing, and to improvement of living conditions'. More significantly, every human being should be free from hunger.[132] The State's obligation to enforce the right to health is succinctly encapsulated in Article 12 that states:

1. The States Parties to the present Covenant recognises the right to the enjoyment of the highest attainable standard of physical and mental health.
2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:

   ….

[130]United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) adopted unanimously by the 70th session (70/175) of the UN General Assembly in Resolution on 17 December 2015 in Resolution A/RES/70/175 http://www.penalreform.org/resource/standard-minimum-rules-treatment-prisoners-smr/. These Rules revised the Standard Minimum Rules for the Treatment of Prisoners, adopted Aug. 30, 1955 by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, U.N. Doc. A/CONF/61. (Hereinafter referred to as the Nelson Mandela Rules).

[131]United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Adopted and opened for signature, ratification and accession by the General Assembly Resolution 39/46 of 10 December 1984, entry into force 26 June 1987, in accordance with article 27(1).Available at http://www.ohchr.org/en/ProfessionalInterest/pages/cat.aspx. South Africa signed the treaty on 29 January 1993 and it was ratified on 10 December 1998.

[132]ICESCR (note 128 above) article 11(2).

(b) The improvement of all aspects of environmental and industrial hygiene;

(c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;

(d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

Article 3 of ICESCR confirms the right to equality of men and women in the application of all the rights enshrined in the Covenant.

It is imperative to delve into the CAT as it has numerous provisions that speak to gangsterism and sexual violence as detailed in chapter four below. CAT firstly recognises 'the rights of all members of the human family is the foundation of freedom, justice and peace…and those rights derive from the inherent dignity of the human person'.[133] Article 1 of CAT defines torture as:

> Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain and suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Article 2(1) of CAT places an obligation on State Parties to 'take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction'. Thus, South Africa instituted the Combating of Torture Act.[134] The Combating of Torture Act speaks directly to section 12 (1)(d) and (e) of the Constitution that states that 'everyone has the right to freedom and security of a person and includes the right not to be tortured in anyway; and not to be treated or punished in a cruel, inhumane or degrading way.'

Other international and regional instruments strengthen the enforcement of inmate's human rights against torture and cruel, inhuman and degrading treatment.[135] Article 5 of the United Nations Universal Declaration on Human Rights for instance states: 'No one shall be subjected to torture

[133]CAT (note 131 above).
[134]The Prevention of Combating and Torture of Persons Act 13 of 2013.
[135]Amnesty International Report *The State of the World's Human Rights* (2008) 352-353. (Hereinafter referred to as Amnesty International Report).

or to cruel, inhuman or degrading treatment or punishment.'[136] These words are echoed in the ICCPR.[137] Article 7 of the ICCPR also makes provision for the prohibition of 'cruel, inhuman or degrading treatment'. Also, in terms of article 5 of the African Charter on Human and Peoples' Rights [138] mechanisms that contribute to the 'exploitation and degradation of man' are prohibited.[139] Various other instruments prohibit torture, cruel, inhuman or degrading treatment or punishment.[140]

The Standard Minimum Rules for the Treatment of Prisoners (SMR) on the other hand, dating back to 1955, laid the foundation for inmates' rights.[141] This international instrument was divided into two parts. Part 1 dealt with the holistic management of correctional centres and its applicability to all categories of inmates whereas Part 2 was tailored to the needs of specific categorical inmates.[142] In retrospect, the SMR served as the backbone for several years in international corrections sphere. Eventually, these rules were revised as more specifically discussed below.

One of the major criticisms of the SMR is that its contents were archaic dating back to 1955. Such outdated rules fail to address current trends. It is arguable that in 1955, South Africa was still operating as an apartheid regime. Although these international standards were all encompassing, it only lay the skeletal structure for modification in years to come. Almost 60 years later in a globalised and technological era, the SMR were changed. This is indicative of the importance placed on inmates' rights from an international perspective. The revised 122 Rules of the United Nations Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules) adopted

[136]Universal Declaration of Human Rights, G.A. Res. 217A (III), 10 December 1948, 3 U.N. GAOR Supp. (No. 11A) 71, U.N Doc. A/810, 7 (1948). See also CAT. South Africa is a party to CAT and art 22 makes provision for the Committee against Torture to hear individual complaints.
[137]ICCPR (note 127 above) article 7.
[138]Organisation of African Unity, African (Banjul) Charter on Human and Peoples' Rights, adopted June 27, 1981, entered into force Oct. 21, 1986, OAU Doc. CAB/LEG/ 67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986. South Africa signed the treaty on 9 June 1986 and it was ratified on 9 June 1996. Available at: http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf
[139]African Charter on Human and Peoples' Rights, adopted 27 June 1981, entered into force 21 October 1986, OAU Doc. CAB/LEG/ 67/3 rev. 5. Res.61 (XXXII) 02: Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (2002). More specifically, reference is made to 'slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment'.
[140]Ougadougou Declaration and Plan of Action on Accelerating Prisons and Penal Reforms in Africa (2002). Promotes the reduction of correctional centre population and reintegration of inmates. Available at <http://www.achpr.org/instruments/ouagadougou planofaction/?prn=1> The African Charter on Prisoners' Rights in its treatment of prisoners emphasises that 'All persons deprived of their liberty shall be treated with respect to the inherent dignity of the human person.'
[141]Standard Minimum Rules for the Treatment of Prisoners (note 129 above).
[142]Ibid.

by the UN General Assembly in December 2015, provides a great level of substance to inmates' human rights debate that lay at the forefront of its very existence. It lays down inmates' rights and standards for correctional centre management.[143]

The SMR canvassed the general administrative guidelines for correctional centres.[144] These guidelines are very similar to South Africa's B Order. However, with the new amendments in the Nelson Mandela Rules, one significant change amongst other was the creation for extensive rules regarding healthcare. When comparing the new insertions and South Africa's domestic law, it is evident that there is now a more onerous burden placed on South African correctional centres to meet their international obligations, more specifically in respect to healthcare.[145] The remaining provisions are only cosmetically modified and remain in the document.

The Nelson Mandela Rules makes provisions for member states to 'compare notes', minimise overcrowding by considering alternative sentencing. Furthermore, it 'encourages Member States to consider allocating adequate human and financial resources to assist in the improvement of correctional centre conditions and the application of the Nelson Mandela Rules'.[146]

The relevant Rules of the Nelson Mandela Rules applicable to this dissertation are highlighted follows:

> Rule 1: All prisoners shall be treated with the respect due to their inherent dignity and value as human beings. No prisoner shall be subjected to, and all prisoners shall be protected from, torture and other cruel, inhuman or degrading treatment or punishment, for which no circumstances whatsoever may be invoked as a justification. The safety and security of prisoners, staff, service providers and visitors shall be ensured at all times.
>
> Rule 13: All accommodation provided for the use of prisoners and in particular all sleeping accommodation shall meet all requirements of health, due regard being paid to climatic conditions and particularly to cubic content of air, minimum floor space, lighting, heating and ventilation.

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[143]'Short guide: On 17 December 2015 a revised version of the Standard Minimum Rules were adopted unanimously by the 70th session of the UN General Assembly in Resolution A/RES/70/175' Available at <http://www.penalreform.org/resource/short-guide-to-the-nelson-mandela-rules/> 3 – 5.
[144]Standard Minimum Rules for the Treatment of Prisoners (note 129 above).
[145]Nelson Mandela Rules (note 130 above) Rules 24 – 35. One other vital observation is that Rule 10 now makes it an international obligation for correctional centres to have a proper file management system for inmates. Thus, one can hope that a future study in the correctional field would be less cumbersome and researcher would be able to gain easy access to reliable correctional centre records.
[146]Ibid 6/33.

> Rule 24: 1. The provision of health care for prisoners is a State responsibility. Prisoners should enjoy the same standards of health care that are available in the community, and should have access to necessary health-care services free of charge without discrimination on the grounds of their legal status.
>
> 2. Health-care services should be organized in close relationship to the general public health administration and in a way that ensures continuity of treatment and care, including for HIV, tuberculosis and other infectious diseases, as well as for drug dependence.[147]

The aforementioned rules are in line with the 'WHO Guidelines on HIV Infection and AIDS in Prisons' that states in its very first general principle that: 'All prisoners have the right to receive health care, including preventive measures, equivalent to that available in the community without discrimination, in particular with respect to their legal status or nationality'.[148]

The very existence and introduction of the Nelson Mandela Rules is indicative of the importance and plight of inmate's rights and therefore a drastic intervention of this veracity was implemented. The General Assembly was:

> guided by the principal purpose of the United Nations, as set out in the Preamble to the Charter of the United Nations and Universal Declaration of Human Rights, and inspired by the determination to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, without distinction of any kind, and in equal rights of men and women and of nations large and small, to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained and to promote social progress and better standards of life in larger freedom.[149]

This single quotation is a summation of the rationale behind revising the Standard Minimum Rules for the Treatment of Prisoners.[150]

Since 1955, there has been a transformation in the advancements of international jurisprudence. The Nelson Mandela Rules makes specific mention of the ICCPR as well as CAT and its optional protocol.[151]

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[147]Nelson Mandela Rules (note 130 above). See generally Rules 24 – 35.
[148]WHO Guidelines on HIV Infection and AIDS in Prisons (1993) Available at <www.who.int>.
[149]Nelson Mandela Rules (note 130 above) 1/33. Five years prior to this colossal step, the UN General Assembly tasked an Inter-governmental Expert Group to amend the Rules. The Rules were named after our very own late President Nelson Mandela who dedicated his life to advocating inmates' rights. This symbol of codified Rules will certainly pave "The Long Walk to Freedom" for all inmates who essentially have human rights.
[150]Standard Minimum Rules for the Treatment of Prisoners (note 129 above).
[151]Nelson Mandela Rules (note 130 above) 2/33.

Quite interestingly, the General Assembly also focuses on two areas that my dissertation has already identified as key problem areas namely respecting inmates as humans with dignity and their access to healthcare.[152] This observation validates my dissertation as being relevant to the international scholarly debate surrounding correctional centre conditions and inmates' rights. Furthermore, the crux of my dissertation having its focus on South African correctional centres,[153] places a heavier burden on it to abide by these Rules that were adopted in South Africa. It is commendable action for South Africa to have actively participated in the revision of the Nelson Mandela Rules by providing financial support and expertise.[154] However, the practical reality to Nelson Mandela's legacy in South African correctional centres may be a dramatic irony. I can easily submit to a simple line of argument: Does the mere fact that an international instrument has been named after a South African leader[155] implicitly recuse the South African State of the obligations that the instrument advocates? It is arguable that this question is pre-emptive and that it will take years for all member states, let alone South Africa, to abide by the Nelson Mandela Rules.

It is arguable that South Africa has metaphorically signed a divorce settlement and it is now up to all international member states to determine whether the deliverables were actually met. Can a layman who stumbles across the Nelson Mandela Rules state that South Africa is an exemplary member State for all other member states to follow suit? If this answer is not in the affirmative, South Africa is under serious pressure to live up to its name. The chapters that follow will demonstrate the veracity and extent of South Africa's adherence to its international obligations and will cast a shadow of doubt on whether it is living up to the Nelson Mandela Rules expectations.

[152]Nelson Mandela Rules (note 130 above) 3/33 – 4/33.
[153]In lieu of the fact that South Africa is an active member state of the UN and express gratitude was extended in the Nelson Mandela Rules to South Africa for accommodating the Expert Group in Cape Town.
[154]Nelson Mandela Rules (note 130 above) 4/33.
[155]Ibid 5/33. Nelson Rolihlahla Mandela sacrificed 27 years in prison to fight against the Apartheid regime and advocate the foundational constitutional values of equality, freedom and human rights.

2.4. Inmates' Rights under African Regional Instruments

The African Charter on Human and Peoples' Rights (ACHPR) does not expressly deal with inmates' rights. However, the case law and resolutions, declarations and guidelines of the African Commission on Human and Peoples' Rights (African Commission) have extended the application of rights in the ACHPR to inmates.[156]

The African Commission was established in 1986 as a supervisory body of the ACHPR. The African Commission plays an active role in monitoring correctional centre conditions and in providing guidelines on correctional centre management. Adherence to the ACHPR contributes to Africa's improvement of human rights.[157] Article 60 and 61 of the ACHPR mandates it to draw inspiration from international law. Thus, it proactively consults with international instruments such as the ICCPR, the SMR and 'other instruments adopted by the United Nations and African countries'. [158] The African Commission also adopts resolutions such as the Ouagadougou Declaration and several other declarations that stem from the African Charter. [159] More importantly, the African Commission made provision for the institution of the Office of the Special Rapporteur on prisons, conditions of detention and policing in Africa, using the power endowed in Article 45 (1) (a) of the ACHPR.[160] I will now discuss inmates' rights in the context of the ACHPR and later hone into the declarations emanating from it.

Similar to the international instruments, the rights to equality[161], life[162] and dignity[163] are echoed in the ACHPR.

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[156]Sarkin J 'An Overview of Human Rights in Prisons Worldwide' in Sarkin J *Human Rights in African Prisons* (2008) 32.CSPRI *Protecting Prisoners' Rights before the African Commission on Human and Peoples' Rights: The Role of Civil Society* (2007), Available at: < http://acjr.org.za/resource-centre/22%20-%20June%202007.pdf>.
[157]Ibid 30.
[158]Ibid. See Article 60 and 61 of ACHPR.
[159]Ibid at 31, Ougadougou Declaration (note 140 above).
[160]Sarkin (note 156 above) 32.
[161]ACHPR (note 139 above) article 3 '1. Every individual shall be equal before the law. 2. Every individual shall be entitled to equal protection of the law'.
[162]Ibid, article 4 'Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right'.
[163]Ibid, article 5 'Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited'.

The contents of section 10, 12(1) and 13 of the Constitution mirrors article 5 of the ACHPR,[164] which states that:

> Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.[165]

This all-encompassing article places a more onerous burden on the State for the protection of inmates' rights in relation to gangsterism and sexual violence.[166]

Article 16 confirms South Africa's obligation to ensure the protection of inmates' health and access to healthcare especially 'when they are sick'.[167] The Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the ACHPR,[168] imposes the following minimum core obligations on the State:

> 67. The minimum core obligations of the right to health include at least the following:
>
> a. Ensure the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalised groups;
>
> b. Ensure the provision of essential drugs to all those who need them, as periodically defined under the WHO Action Programme on Essential Drugs, and particularly anti-retroviral drugs;
>
> c. Ensure universal immunisation against major infectious diseases;
>
> d. Take measures to prevent, treat and control epidemic and endemic diseases;
>
> e. Provide education and access to information concerning the main health problems in the community, including methods of preventing and controlling them.[169]

[164]ACHPR (note 139 above) article 5.
[165]Ibid.
[166]Ibid article 5: 'Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited'.
[167]Ibid article 16: '(1) Every individual shall have the right to enjoy the best attainable state of physical and mental health. (2) States Parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick'.
[168]Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights 24. Available at: http://www.achpr.org/files/instruments/economic-social-cultural/achpr_instr_guide_draft_esc_rights_eng.pdf
[169]Ibid 24 para 67.

The African Commission has adopted various declarations and guidelines in relation to correctional centres. Some of these include the Ouagadougou[170] and Kampala Declarations[171] and the Robben Island Guidelines[172] discussed below.

The Ouagadougou Declaration recognises that despite the current measures in place, substantial inadequacies are still imminent in the midst of strained budgetary constraints and amenities for the treatment of inmates.[173] The Declaration also posited several practical recommendations.

Upon closer inspection of the Declaration, the first recommendation is aimed at reducing the primary condition faced by most correctional centres namely overcrowding.[174] As discussed in the chapters that will follow, this correctional centre condition has spiraling effects on other correctional centre conditions, which in turn impact on inmates' rights. The Declaration postulates strategic mechanisms in an effort to reduce the correctional centre population under three categories, new inmates, remand detainees and sentenced inmates. These include alternative sentencing (such as community service), restorative justice, decriminalisation of minor offences, circumvention of undue delay in the trial procedures, effective case management, detention of remand detainees as a measure of last resort, intermediary intervention and assessment of incarceration in lieu of the current correctional centre capacity.[175]

Correctional centre resources are under severe strain and the State is expected to become self-sufficient to ensure the fulfillment of inmates' human rights.[176] Rehabilitation being one of the implicit rights where inmates should be afforded an opportunity to develop skills whilst in a correctional centre to smoothly revert into the society upon completion of serving their term.[177]

[170]Ougadougou Declaration (note 140 above).
[171]UN Economic and Social Council The Kampala Declaration on Prison Conditions in Africa (1996). Available at <http://penalreform.org/kampala-declaration-on-prison-conditions-in-africa-2.html>.
[172] Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (The Robben Island Guidelines) ACHPR Res 61 (XXXII) 02 (2002)32nd Ordinary Session 17-23 October 2002.
[173]Ougadougou Declaration (note 140 above).
[174]Ibid
[175]Ibid para 1.
[176]Ibid para2.
[177]Ibid para 3.

One of the pivotal issues in the administration of correctional centres is the application of the Rule of Law. The Declaration emphasises four important points for consideration namely:

> 4. Applying the Rule of Law to prison administration
>
> Ensure that prisons are governed by prison rules that are publicized and made known to prisoners and staff.
> Review prison legislation in line with national constitutional guarantees and international human rights law.
> Encourage independent inspection mechanisms, including the national media and civil society groups.
> Ensure staff are trained in the application of the relevant laws and international principles and rules governing the management of prisons and the prisoners' rights.[178]

The aforementioned points highlight the importance of creating awareness and timeously reviewing correctional centre rules to ensure accountability and transparency in the application of such rules.

The Declaration emphasised that The Department of Health needs to play a more active role in correctional centre healthcare. National HIV and AIDS campaigns would assist in educating the community of inmates' health.[179]

The Declaration also urged for the draft African Charter on Prisoners' Rights to be publicised and for the development of a 'United Nations Charter of Basic Rights of Prisoners'. This recommendation is vital in trying to enforce and protect inmates' rights internationally.[180]

The Kampala Declaration on Prison Conditions in Africa considered the extreme levels of overcrowding as inhumane and that these conditions impact on cleanliness, food and access to healthcare.[181] The Kampala Declaration recommended that inmates' human rights must be protected. Inmates must live in correctional centre conditions that are parallel to their right to dignity. Correctional centre conditions should not further curtail their hardships caused by limiting their right to liberty. It also accounted for the fact that remand detainees are a recurring cause of overcrowding. The Kampala Declaration proffered many suggestions regarding remand detainee's

[178]Ougadougou Declaration (note 140 above) para 4.
[179]Ibid para 5.
[180]Ibid para 6 and 7.
[181]Kampala Declaration (note 171 above).

alternative sentencing.[182] The chapters that follow will demonstrate whether any of these suggestions have been implemented in South Africa.

The Robben Island Guidelines[183] recommended that torture be criminalised in national legislation in accordance with Article 1 of CAT.[184] This issue is discussed further in chapter four. The guidelines are very useful in terms of correctional centre conditions, overcrowding, and medical care.[185]

The African Commission passed a resolution in 1995 documenting its main concern of the correctional centre conditions of African countries as overcrowding, poor health and sanitation, insufficient rehabilitative programs and large number of remand detainees. The Commission observed that several African countries do not comply with obligations in the ACHPR, ICCPR, United Nations Standard Minimum Rules for the Treatment of Prisoners and international standards that protect inmates' rights. Thus, it urged member states to furnish reports to the United Nations Secretary General in order to comply with the Standard Minimum Rules for the Treatment of Prisoners.[186]

2.5. Inmates' Constitutional Rights

The escalation in South Africa's crime rates motivates its frustrated citizens to believe that inmates should be housed in concentration camps of suffering.[187] However, the innate social values fostered in a State institution faced with the dilemma of either neglecting or protecting the rights of inmates in order to facilitate the security of its nation, is essentially informed by the tenets of the Constitution.[188] The preamble to the Constitution reads:

> *We*, the people of South Africa,
>
> Recognise the injustices of our past;
>
> Honour those who suffered for justice and freedom in our land;

[182]Kampala Declaration (note 171 above).
[183]The Robben Island Guidelines (note 172 above).
[184]Ibid c4.
[185]Sarkin (note 156 above) 31.
[186]Resolution on Prisons in Africa ACHPR (1995). Available at <www.chr.up.ac.za>.
[187]Muntingh (note 19 above) 5.
[188]Ibid.

> Respect those who have worked to build and develop our country; and
>
> Believe that South Africa belongs to *all* who live in it, *united in diversity*.
>
> We therefore, through our freely elected representatives, adopt this Constitution as the *Supreme law* of the Republic so as to –
>
> > Heal the divisions of the past and establish a society based on *democratic values, social justice and fundamental human rights*;
> >
> > Lay the foundations for a democratic and open society in which government is based on the will of the people and *every citizen* is *equally* protected by the law;
> >
> > Improve the quality of life of *all* citizens and free the potential of *each person*; and
> >
> > Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.
> >
> > May God protect *our people*.[189](My emphasis)

The preamble reflects the foundational principles that are firmly grounded in South Africa's constitutional democracy. The wording of the preamble is clear in that it recognises that the rights contained in the Constitution should extend to *each and every* citizen.[190] It is noteworthy to highlight that the Bill of Rights applies to 'everyone' with the exception of political rights,[191] citizenship rights,[192] freedom of trade, occupation and profession[193] and access to land[194] which uses the terminology 'citizen(s)'. It is common cause to be cognisiant to this issue raised in the context of my dissertation, as inmates can be citizens, permanent residents or temporary residents. Therefore, its all-inclusive application also extends to the pariah society that includes inmates, detainees, arrested and accused persons.[195]

Upon closer inspection and analysis of the preamble, it is safe for me to derive the following conclusions in the context of my dissertation:

1. Inmates form part of the population of South Africa.
2. South Africa also belongs to inmates, as they are inhabitants that are united in their own unique mannerism in diversity.

[189]The Constitution, Preamble.
[190]Ibid.
[191]Ibid s 19.
[192]Ibid s 20.
[193]Ibid s 22.
[194]Ibid s 25(5).
[195]Ibid s 35.

3. The Constitution is the Supreme law of the Republic.
4. The correctional centre society should also be based on democratic values, social justice and fundamental human rights.
5. The law equally protects every inmate.
6. The Constitution provides for the improvement of the quality of life of inmates and harness the potential that each inmate may hold.[196]

I have deduced the aforementioned hypothesis in lieu of the interpretation and limitation clauses[197] that will be discussed later in this chapter. The aforementioned points of departure, even though implicit in the preamble of the Constitution, have a practical bearing on the interpretation of inmates' rights.[198] My main emphasis here is that inmates are endowed with constitutional rights.

The Constitution in its foundational sections as encapsulated in section 7(1), (2) and (3) of the Bill of Rights,[199] enshrines human rights of *all* people. It is well defined that *all* people are inclusive of inmates, remand detainees or any suspected or accused persons.

Correctional centres are not democratic establishments created to predominantly enforce human rights, quite contrary, they are mechanisms to deprive one of their right to liberty and enforce justice. So then how is the concept of rights placed at the epitome of a correctional centre amidst the Constitution? Muntingh maps out a realistic guide in terms of balancing the very functions of a correctional centre and the constitutional values that underpin a democracy.[200] He states that there are four key elements in striking this balance namely:

1. Correctional centres must have a clear philosophical structure for their existence in unison with the Constitution.
2. Correctional centres are to refrain from the infringement of the inmates' rights that are specifically mentioned in the Table of non-derogable rights.[201]

[196]The Constitution, Preamble.
[197]The Constitution s 36, 38 and 39.
[198]The Constitution, Preamble.
[199]The Constitution s 7(1), (2) and (3): 'This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of *all* people in our country and affirms the democratic values of human dignity, equality and freedom.'; 'The state must respect, promote and fulfill the rights in the Bill of Rights. The rights in the Bill of Rights are subject to limitations contained or referred to in section 36 …' (own emphasis).
[200]Muntingh (note 19 above) 5.
[201]The list of these rights appear below and will be discussed at length.

3. The executive is to bear vertical and horizontal accountability of correctional centres.
4. The administration and operations of correctional centres must be transparent.[202]

The thematic arguments that are raised in these four pillars of facilitating the enforcement of inmate's rights in correctional centres are vital. Correctional centres are an evolutionary mechanism that require the oils of enforcing the constitutional rights of inmates to accelerate the smooth turning of the wheels of justice.[203]

> Imprisonment per se is not a justification for the limitation of rights, save for those rights that are absolutely necessary to curtail in order to implement the sentence (or order) of the court. The right to liberty stems from section 7(1) of the Constitution that upholds the right to freedom. It is apparent that once prisoners are detained that their right to liberty is naturally limited. This exercise of balancing and limiting of rights is flawed as no equilibrium is reached with prisoner's other rights being infringed upon by the State.[204]

Therefore, it can be inferred that an inmate's sentence deprives him from liberty and this ultimately can be construed as his punishment.

In an attempt to clearly explain the rights that inmates have, I have placed their rights into two catergories. Firstly, holistic foundational rights and secondly specific yet overarching rights informed by the specific identified correctional centre conditions that my dissertation will focus on in the next three chapters.[205]

2.5.1. Foundational Constitutional Rights Afforded to Inmates

> If human dignity is regarded as foundational in our Constitution, a corollary thereto must be that it must be jealously guarded and protected …[206]

Foundational rights in the context of my dissertation refers to those basic rights that are afforded to inmates and are listed in the table of non-derogable rights in the Constitution.[207] Thus, the right

[202]Muntingh (note 19 above) 5.
[203]Ibid.
[204]Ibid 7 – 8. CO Okpaluba 'The Right to the Residual Liberty of a Person in Incarceration: Constitutional and Common Law Perspectives' (2012) 28(3) *South African Journal for Human Rights* 458.
[205]It must be noted that despite compartmentalising the rights into two categories, this in no way implies a hierarchy or allude to the rights not being interdependent.
[206]*NM and Others v Smith and Others (Freedom of Expression Institute as Amicus Curiae)* 2007 (5) SA 250 (CC) para 50.
[207]The Constitution – Table of non-derogable rights.

to equality,[208] the right to human dignity[209] and the right to life[210] are considered as inmates' foundational rights, as illustrated in Diagram 1 below. The relevant provisions on these rights read

> *Everyone* is equal before the law and has the right to equal protection and benefit of the law.[211]
>
> Equality includes the full and equal enjoyment of all rights and freedoms.[212]
>
> *Everyone* has inherent dignity and the right to have their dignity respected and protected.[213]
>
> *Everyone* has the right to life.[214] (My emphasis)

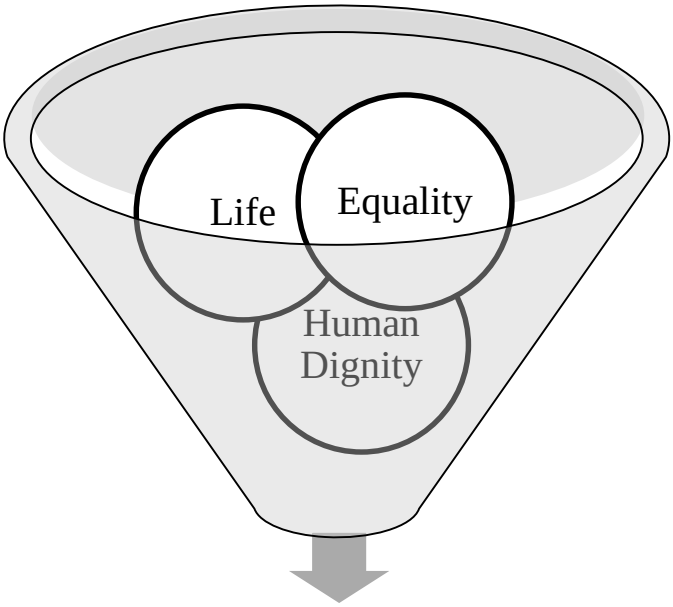

Diagram 1: Foundational Rights that also extend to inmates (The circles in the diagram interlock representing that these enlisted rights are interdependent).

The right to equality, human dignity and life are foundational rights that are afforded to *everyone including inmates*.[215] It must be emphasised that these three identified foundational inmates' rights

[208]The Constitution s 9. The right to equality is protected 'with respect to unfair discrimination solely on the grounds of race, colour, ethnic or social origin, sex, religion or language'.
[209]Ibid s 10. The extent, to which the right to human dignity is protected, is its entirety (subject to s 36 of the Constitution). See table of non-derogable rights in the Constitution.
[210]Ibid s 11. The extent, to which the right to life is protected, is in its entirety (subject to s 36 of the Constitution). See table of non-derogable rights in the Constitution.
[211]Ibid s 9 (1).
[212]Ibid s 9(2).
[213]Ibid s 10.
[214]Ibid s 11.
[215]Ibid s 9, 10 and 11.

are interdependent.[216] Foundational inmates' rights are ultimately violated when specific inmates' rights (set out later in this chapter) are also violated. Therefore, a symbiotic relationship exist between these three foundational inmates' rights and specific inmates' rights.

I will now proceed to briefly discuss the intricacies of the right to equality, human dignity and life. The discussion will grapple with the core elements that are raised in the context of inmates' rights only. It is impossible to conduct a full constitutional, jurisprudential and administrative debate into these three foundational rights as a study of this disposition would go beyond the scope of my dissertation.

2.5.1.1. Inmates' Right to Equality

Equality has boggled legal minds for centuries and still stands the test of time. The meaning of equality on the face of it seems obvious yet varies in its realistic application.[217] Equality is either distinguished as formal or substantive equality. Formal equality in the words of Aristotle is to 'treat like cases alike'.[218] This is a rather simplistic formulation of equality where no subjective factors should account for the different treatment of an individual with the same circumstances.[219] Conversely, substantive equality involves the balancing of interests in order to detract from the creation of further inequality.[220] This form of equality takes into account the extenuating circumstances of an individual's culture, political and legal affiliations and background.[221] This is not an exhaustive list and I believe that the application of inmates' rights should fall under the realm of substantive equality, as inmates are a distinct social group isolated from the society in many different ways. Inmates fall victim to discrimination by the mere fact that they are inmates at the least.

[216]Interdependent in this context means exactly what the African Commission envisaged as 'all human rights are indivisible, interdependent, and interrelated and cannot be enjoyed in isolation from each other'. Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights (note 168 above) Preamble 26.
[217]A Smith 'Equality Constitutional Adjudication in South Africa' (2014) 14 AHRLJ 611.
[218]Ibid.
[219]Ibid.
[220]Ibid 613.
[221]Ibid 614.

There are various Constitutional Court cases adjudicating on the right to equality.[222] However, for purposes of this dissertation, the right to equality is considered with reference to two recent Constitutional Court judgments that speak directly to an inmate's right to be treated equally. These two cases are *Mhlongo v S, Nkosi v S*[223] and *Molaudzi v S.*[224] These two cases center around the same facts. It was alleged that Mhlongo (accused 2); Nkosi (accused 4) and Molaudzi (accused 5) were part of a group that shot Warrant Makuna on 3 August 2002 and conspired to steal his vehicle. Warrant Makuna later died. The three accused men were charged with murder, robbery with aggravating circumstances, attempted robbery, unlawful possession of firearms and unlawful possession of ammunition.[225]

The trial court found Mhlongo and Nkosi guilty based on common purpose to murder and rob Warrant Makuna. They were sentenced to life incarceration for the murder, fifteen years for the robbery and six years for the latter two charges. The accused appealed their matters, which was dismissed. This was done on the basis that hearsay evidence of accused 7 (Khanye) was corroborated with that of the statements of accused 1 (Matjeke) and 3 (Makhubela). These statements were considered admissible and were the sole evidence for convicting the accused.[226]

The Constitutional Court held it had the requisite jurisdiction as the matter hinges around the right to equality before the law and the right to a fair trial. It emphasised that these rights are fundamental constitutional rights. The Court found that this matter was of public significance and in the interests of justice to allow the appeal.[227]

The High Court erred in its analysis of the evidentiary requirements of admissions and confessions. Thus, it utilised the extra-curial statements of the co-accused firstly as confessions and then reverted their reliance as admissions. This had substantially prejudiced the rights of the accused.[228]

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[222]*Prince v President, Cape Law Society* 2002 (3) BCLR 231 (CC); 2002 (2) SA 794(CC). *Du Toit* & A*nother v Minister of Welfare and Population Development & Others* 2003(2) SA 198 (CC). *Jordan & Others v S* 2002 (6) SA 642 (CC). *National Coalition for Gay and Lesbian Equality v Minister of Justice & Others* 1999(1) SA 6 (CC) *(National Coalition). MEC for Education: KwaZulu-Natal & Others v Pillay Case* CCT 51/06 [2007] ZACC 21.
[223]*Mhlongo v S; Nkosi v S* (2015) ZACC 19; 2015 (8) BCLR 887 (CC); 2015 (2) SACR 323 (CC).
[224]*Molaudzi v S* (2015) ZACC 20; 2015 (8) BCLR 904 (CC); 2015 (6) SA (CC).
[225]*Mhlongo v S; Nkosi v S* (note 223 above) para 3 – 4. *Molaudzi v S* (note 224 above) para 2 – 3.
[226]*Mhlongo v S; Nkosi v S* (note 223 above) para 5.
[227]Ibid para 17.
[228]Ibid para 36.

The Court held:

> It is an irrational distinction which violates section 9(1). It cannot be saved by the limitations clause contained in section 36 of the Constitution because this limitation on the right to equality before the law is not "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom". Nor did the State seek to justify this limitation. [229]

Therefore, the Constitutional Court ordered that the use of extra-curial statements to convict an accused violate their right to equality and their right to a fair trial. As a result, the statements were inadmissible and the common law position was reinstated.[230] Mhlongo and Nkosi's convictions and sentences were set aside. The Constitutional Court enforced the accused rights and set them free.[231]

In the *Molaudzi* case, the Constitutional Court referred to its prior judgment in the *Mhlongo* and *Nkosi* cases as described above.[232] The court extensively deliberated on the legal doctrine of *res judicata*, which simply means that a court cannot entertain litigation of an identical case, disputes and litigants.[233] The Court held:

> The applicant is serving a sentence of life imprisonment, of which he has already served ten years. His co-accused, convicted on similar evidence, had their convictions and sentences overturned. A grave injustice will result from denying him the same relief simply because in his first application he did not have the benefit of legal representation, which resulted in the failure to raise a meritorious constitutional issue. The interests of justice require that this Court entertain the second application on its merits, despite the previous unmeritorious application, and relax the principle of *res judicata*. [234]

Thus, Molaudzi was released on the same grounds as in the *Mhlongo* and *Nkosi* cases.[235] In the recent corrections context, the Constitutional Court is favouring the relaxation of common law

[229] *Mhlongo v S; Nkosi v S* (note 223 above) para 37.
[230] Ibid para 38.
[231] Ibid para 44.
[232] *Molaudzi v S* (note 224 above) para 10.
[233] Ibid para 14.
[234] Ibid para 40.
[235] Ibid para 48.

principles as later discussed in the *Lee* case.[236] This is of course a monumental stride in the protection of inmates' rights in South Africa more specifically in the equal treatment of inmates.

These two groundbreaking Constitutional Court cases lay the foundation for my dissertation's debate as it reaffirms an inmate's right to equality and a fair trial. It is noteworthy to critically analyse the findings in the context of this dissertation. The outcome of these cases support the empowerment of inmates' constitutional rights. However, the only criticism that I would like to extend is the fact that the actual rights violated and the extent of their violation, was a direct result of the previous court erring in enforcing inmates' rights. Cursory passing statements allude to the fact that Molaudzi already spent ten years in jail for a crime that the State had no evidence to convict.[237] However, no indication of the hardships that he faced were canvassed in the judgment to create public awareness of the veracity of the extent of the impact of correctional centre conditions on inmates' human rights at the hands of a court who passed an incorrect judgment. I am of the opinion that the Constitutional Court can provide more substance in espousing inmates' rights and conditions that they are forced to endure, in their judgments as opposed to being overly formalistic regarding procedure. The lengthy discussions of procedures in judgments detracts from human rights violations. A more in depth substantive equality analysis could serve as a road map to inmates' rights violations especially for an inmate who was innocent and spent years in a correctional centre.

Media reports by Carolyn Raphaely at the Wits Justice Project (WJP) reveal the truth behind Molaudzi's story.[238] The WJP was very instrumental in the release of Molaudzi as they were in Fuzi Mofokeng's wrongful arrest matter.[239] The fact that Molaudzi was wrongfully convicted and spent approximately eleven years in jail for a crime he did not commit is not the only humanitarian consideration. The correctional centre conditions and his battle to tell the truth is the crux of my dissertation. Molaudzi was tortured in Kokstad correctional centre by DCS officials who used shock shields[240] and placed him in solitary confinement for a period of four years. Molaudzi

[236]*Lee v The Minister of Correctional Services* 2013 (2) SA 144 (CC); CCT20/2012 ZACC30.
[237]*Molaudzi v S* (note 224 above) para 40.
[238]The Star 'Prisoner set free after years in jail for a crime he didn't commit' (30 June 2015) 7.
[239]WJP Conference (note 24 above).
[240]Shock shields/boards are 'electronically activated devices' as anticipated in the Correctional Services Regulations 2004 as amended on 25 April 2012, Regulation 19. These devices are classified as 'non-lethal incapacitating devices. Shock shields/boards send electronic shock waves into the body.

encountered numerous problems. His first challenge as an indigent and uneducated client was obtaining legal representation (which was not readily available).[241] During the process of seeking justice, Molaudzi faced delays due to lost court files and missing transcripts. It took him approximately eight years to enforce his basic constitutional right to appeal his case. Finally, when his warrant of release was received, North West (where Kokstad correctional centre is based) experienced load shedding which delayed processing his release.[242] He spent his first day of freedom incarcerated. Molaudzi's emotional state of mind is unstable and family life as a father to his son were severely affected. Whilst spending eleven years in a correctional centre, he missed out on his son's childhood. Molaudzi's constitutional right to equality amongst others were severely infringed upon.[243]

One other noteworthy case regarding the right to equality is the case of *Tshikane v Minister of Correctional Services and Others*.[244] The issue revolved around the common practice of transferring inmates from one correctional centre to the next.[245] The Applicant was serving a 13 year sentence for armed robbery amongst other convictions committed in 2011.[246] Tshikane was transferred from Johannesburg Medium B correctional centre to Baviaanspoort correctional centre without consultation with him.[247] The Court held that the Respondents violated the principle of the *audi alteram partem* and that Tshikane should remain in the Johanesburg correctional centre until the correctional officials follow the correct procedures.[248]

Therefore, has his rights to dignity and equality really been restored or will it take years to forgive the State for derelictually infringing upon his constitutional rights? Should the State be liable for delictual damages for the torture that was not mentioned in the judgment? In light of the aforementioned discussion, one can conclude that enforcing an inmates' right to equality is practically problematic due to the interdependent nature of human rights. Once the right to equality is infringed upon, various other rights are equally infringed upon such as the right to dignity.

[241]The Star 'Prisoner set free after years in jail for a crime he didn't commit' (30 June 2015) 7.
[242]Ibid.
[243]Ibid.
[244]*Tshikane v Minister of Correctional Services and Others* 2015(2) SACR 99 (GJ)
[245]Ibid para 2.
[246]Ibid para 3.
[247]Ibid.
[248]Ibid 16.

2.5.1.2. Inmates' Right to Human Dignity

Interestingly, Ackermann draws upon a theological investigation into the interrelated rights of human dignity and equality. In doing so, it is noteworthy to begin this section with Ackermann's observations:

> The Abrahamic religions tend to understand human equality and human worth(dignity) as being rooted in the fact that every human being is an image of the Divine being, and accordingly has priceless incomparable dignity. For this reason every human being is in essence equal to every other human being in *image* and *humanity*, hence in dignity.[249]

The concept of dignity is one that is illusive and intricate in its application and interpretation. Dignity is a foundational notion that ameliorates other rights. It is problematic to single-handedly define human dignity as a right in itself. Dignity validates the fact that we are essentially 'human beings' and this validation is the source for the development of our rights, duties and obligations.[250] Megret offers us a very crisp interpretation of the concept of dignity. He states that dignity essentially comprises of five interpretations. Firstly, it is subjective in that a person's self-worth cannot be physically quantified yet dignity lies within a person's spirit or being. Secondly, dignity is relative as a person's sense of having rights are shaped by the environment in which they exist. These include socio-economical and physiological factors. Thirdly, dignity is relational in that it depends on the interactions with others for it to be meaningfully respected. Fourthly, it is personal, hence each and every person is endowed with dignity. Lastly, dignity is holistic in that it encompasses more than just a compilation of rights.[251] From this interpretation, it is clear that human dignity is a tool that can be used to protect against the infringement of rights, as it is the origin of most rights. Therefore, the State must handle human beings as an end in countenance of being a means.[252] Inmates are also human beings in the context of this definition. An inmates' dignity, even though compromised due to his confines, still determines his sense of self-worth.[253] The concluding remarks of Megret resonate in the South African context because if the State treats

[249]L Ackermann Human Dignity: Lodestar for Equality in South Africa (2002) 34.
[250]F Megret 'Research Project on Human Dignity: 'Dignity: A Special Focus on Vulnerable Groups' Agenda for Human Rights United Declaration of Human Rights (UDHR) June (2009) 1. Available at <http://www.udhr60.ch>.
[251]Ibid 4.
[252]Ibid.
[253]Ibid 101.

inmates in contempt of their inherent human dignity, the State's dignity will depreciate to the same extent.[254]

Section 1 of the Constitution grounds a tripod of rights namely the right to 'human dignity, equality and freedom'.[255] Human dignity being the abstract core value, when culminated with other rights, it creates a unified equilibrium of rights.[256] 'As is typical of its treatment of important abstractions in the Constitution, the Constitutional Court has not ventured a comprehensive definition of human dignity'.[257] The court aspires to adopt an all-incumbent array of values with a jurisprudential influence. This scenario is bound to detract from the true meaning of the terminology human dignity, as its very nature is difficult to grapple with on the face of the word. Constitutional protection of human dignity dictates that one should recognise the 'value and worth of all individuals as members of society.' Thus, this right informs the balancing act that is intrinsic in the limitation clause.[258]

The Constitutional Court in *S v Williams* advanced that 'even the vilest criminal remains a human being possessed of common human dignity'.[259] A conciliation of values and rights indicate that human dignity is synonymous to the prohibition of cruel, inhuman and degrading punishment. However, even though the two concepts are linked, they are variably distinct in their application.[260] Chaskalson P in *S v Makwanyane* states that a determining factor to decipher cruel and inhuman treatment is the right to dignity.[261] This was reiterated in *S v Williams,* that the true test lies at the heart of society's perception of civility and human dignity.[262]

The exclusivity of the application of the right to human dignity in the context of my dissertation lies at the following debate that is very simple. The State has abolished the death penalty in the case of *S v Makwanyane*. Therefore, the State imposes the punitive measure of incarceration, which infringes on an inmate's right to liberty. However, this limitation does not allow inmates to have

[254]Megret (note 250 above) 106.
[255]I Currie & J De Waal *The Bill of Rights Handbook* Sixth Edition (2013) 250.
[256]Ibid 251.
[257]Ibid 251.
[258]Ibid 253.
[259]*S v Williams* 1995 (7) BCLR 861 (CC), 1995 (3) SA 632 (CC) para 58.
[260]I Currie & J De Waal (note 255 above) 254.
[261]*S v Makwanyane* (note 51 above) para 142 – 143.
[262]*S v Williams* 1995 (7) BCLR 861 (CC), 1995 (3) SA 632 (CC).

a complete suspension of their other constitutional rights. Limitation of an inmate's right is to be justifiable and in accordance with objectives of the Department of Correctional Services.[263]

It is noteworthy to emphasise the Constitutional Court's reasoning in *National Coalition for Gay and Lesbian Equality v Minister of Justice* in that gay men cannot be criminalised for partaking in sexual activities that are natural to them and would violate their dignity.[264] Aside from sexual violence in correctional centres, this case is of particular importance regarding the right to equality for homosexual inmates.[265] Sachs J held in the Constitutional Court case of *August v Electoral Commission* that: 'The vote of each and every citizen is a badge of dignity and personhood. Quite literally, it says that everybody counts'.[266] Seeing that the Constitutional Court entrenches human dignity as a foundational right, it is common cause that it should be extended to the application of inmates' rights.

2.5.1.3. Inmates' Right to Life

Justice O' Regan advocates that the right to life is the right to live in accordance with human dignity. The *Makwanyane*[267] and *Soobramoney*[268] cases state that:

> [t]he right to life is, in one sense, antecedent to all the other rights in the Constitution. Without life in the sense of existence, it would not be possible to exercise rights or to be the bearer of them. But the right to life was included in the Constitution not simply to enshrine the right to existence. It is not life as mere organic matter that the Constitution cherishes, but the right to human life: the right to share in the experience of humanity. This concept of human life is at the centre of our constitutional values. The Constitution seeks to establish a society where the individual value of each member of the community is recognized and treasured. The right to life is central to such a society. The right to life, thus understood, incorporates the right to dignity. So the rights to human dignity and life are entwined. The right to life is more than existence, it is a right to be treated as a human being with dignity: without dignity, human life is substantially diminished. Without life, there cannot be dignity.[269]

[263]I Currie & J De Waal (note 255 above) 254 – 255.
[264]*National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999(1) SA 6 (CC) para 28.
[265]Ibid.
[266]*August v Electoral Commission* 1999 (3) SA 1 (CC) 17.
[267]*S v Makwanyane* (note 51 above) para 326 – 327
[268]*Soobramoney v Minister of Health (Kwazulu-Natal)* 1998 (1) SA 765 (cc) para 353.
[269]*S v Makwanyane* (note 51 above) para 326 – 327 and *Soobramoney v Minister of Health (Kwazulu-Natal)* 1998 (1) SA 765 (cc) para 353.

The Constitution endows the right to life on everyone.[270] 'The right to life in the South African Constitution is textually unqualified'.[271] The groundbreaking case of *S v Makwanyane*, abolished the death penalty. It is noteworthy to quote the rationale as encapsulated below:

> Death is the most extreme form of punishment to which a convicted criminal can be subjected. Its execution is final and irrevocable. It puts an end not only to the right to life itself, but to all other personal rights which had vested in the deceased under Chapter Three of the Constitution.[272]

> Where the arbitrary and unequal infliction of punishment occurs at the level of a punishment so unique as the death penalty, it strikes me as being cruel and inhuman. For one person to receive the death sentence, where a similarly placed person does not, is, in my assessment of values, cruel to the person receiving it. To allow chance, in this way, to determine the life or death of a person, is to reduce the person to a cypher in a sophisticated judicial lottery. This is to treat the sentenced person as inhuman**.** [273]

Thus, the rationale for the abolition of the death penalty is not only the violation of an inmates' right to life as advocated in section 9 of the Constitution but also it is taken a step further in that it infringes on the freedom and security of a person in section 11. Thus, this revolutionary case gave meaning to South Africa's constitutional wording: 'not to be treated or punished in a cruel, inhuman or degrading way'.[274]

Two most important rights enlisted in the table of non-derogable rights is the right to dignity and life that are entirely protected.[275] The State has the duty to 'respect, protect and promote' the rights in the Bill of Rights.[276] The State's common law duty to protect the right to life is made apparent in the case of *Carmichele v Minister of Safety and Security*:

> It is common ground that the State's obligation in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions. It is thus accepted by those appearing before the Court that Article 2 of the

[270]Section 11 of the Constitution.
[271]I Currie & J De Waal (note 255 above) 259.
[272]*S v Makwanyane* (note 51 above) 26.
[273]Ibid 166.
[274]Ibid para 26, 80, 153
[275]The Constitution – Table of Non-derogable rights.
[276]The Constitution s 7(2).

> Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventative operational measures to protect an individual whose life is at risk from the criminal acts of another individual.[277]

I would like to think that this argument as canvased above by the Constitutional Court is pertinent to my dissertation's debate to the extent that it reinforces an inmates' right to life and to be afforded protection by the State. Later in the chapter on gangsterism, I tackle this debate in depth to solicit the importance of inmates' right to life[278] and the overarching rights to safety and security[279] in a correctional centre.

2.5.2. Inmates' Specific Constitutional Rights as informed by Three Correctional Centre Conditions namely Overcrowding, Gangsterism and Sexual Violence, and Access to Healthcare

Specific rights common to *all* include the right to freedom of security of a person,[280] freedom from slavery, servitude and forced labour,[281] the right to privacy,[282] the right to religion, belief and opinion,[283] the right to freedom of association,[284] political rights[285] and right to education.[286] In lieu of acquiring the status of a detainee, the aforementioned rights are fully enforceable.[287]

Before setting out rights in relation to conditions, it is necessary to canvass the provision specifically set aside for arrested, detained and accused persons and also the general position on limitation of inmates' rights.

[277] *Charmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) para 45.
[278] The Constitution s 11.
[279] Ibid s 12.
[280] Ibid.
[281] Ibid s 13.
[282] Ibid s 14.
[283] Ibid s 13.
[284] Ibid s 18.
[285] Ibid s 19.
[286] Ibid s 29.
[287] The Constitution.

Section 35 specifically details the rights of arrested, detained and accused persons, of which the following subsections will be scrutinised:

> Everyone who is arrested for allegedly committing an offence has the right – to conditions of detention that are consistent with human dignity, including at least exercise and the provision at state expense of adequate accommodation, nutrition, reading material and medical treatment.[288]

> Every accused person has the right to a fair trial, which includes the right – to have their trial begin and conclude without unreasonable delay.[289]

Section 35 (2)(e) of the Constitution emphasises that conditions of detention are to be coherent with human dignity.[290] In the introductory chapter of the Correctional Services Act, one of the primary purposes of a correctional centre is to safely detain inmates while upholding their right to human dignity. Furthermore, the next chapter in the Act is entitled 'Custody of all inmates under conditions of human dignity'.[291] Section 35 (2)(e) reinforces the inherent right to human dignity and to have their dignity respected and protected as encapsulated in section 10 of the Constitution. It is clear from the discussion of human dignity under the three foundational rights above that human dignity dovetails into inmates' specific rights. This reiteration in the constitutional provisions, evidences the importance of inmates' right to human dignity.

Subject to the limitation clause,[292] no correctional centre (State or private) can violate any of the tabulated non–derogable rights[293] and none of the section 35 rights either.[294] Looking at the ranking of human rights cases, inmates have a very unique position as various other vulnerable

[288]The Constitution s 35(2) (e).
[289]Ibid s 35(3) (d).
[290]Ibid s 35(2) (e).
[291]Correctional Services Act Chapter II s 2(b) and Chapter III.
[292]The Constitution s 36. 'Limitation of rights
(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom taking into account all relevant factors, including
a. The nature of the right;
b. The importance of the purpose of the limitation;
c. The nature and extent of the limitation;
d. The relation between the limitation and its purpose; and
e. Less restrictive means to achieve the purpose.
(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights'.
[293]Ibid s 37.
[294]Muntingh (note 19 above) 5.

groups' rights occupy the top tiers like women and children.[295] The exclusivity of their position lies in their relationship with the State who can directly exercise their powers of coercion on inmates.[296]

A clear distinction must be made between the process of interpreting rights and determining the limitation of rights. Where it is alleged that a certain conduct or provision of the law infringes on a right contained in the Bill of Rights, the following two-stage (interpretation of rights) approach will apply. Firstly, the identification of rights that have been infringed and secondly whether such infringement is justified. However, the determination as to whether 'an infringement of a right is a legitimate limitation of that right' is different and requires a factual enquiry. Tangible evidence has to be tendered in accordance with the requirements of section 36 of the Constitution, for a court to declare that a right be limited. The limitation of a right must be 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'.[297] The five stringent factors contained in section 36 of the Constitution guides the court in balancing the purpose, impact and importance of the infringement of a right with the nature and extent of the limitation.[298] The *Makwanyane*[299] case highlighted the importance of the right to life and dignity. Thus, in order to limit these rights for instance, very convincing reasons should be posited.[300] Proportionality and less restrictive means influences the balancing act in justifying the limitation of a right.[301]

The general rule of thumb is that the State is entitled to deprive a person's right to freedom[302] provided it meets the two-pronged substantive and procedural test.[303] Thus, the reasons for deprivation of freedom must be acceptable and procedurally correct. There must be a nexus

[295]Muntingh (note 19 above) 9.
[296]Ibid.
[297]Currie and de Waal (note 51 above) 339.
[298]Ibid 341.
[299]*S v Makwanyane* (note 5 above).
[300]Ibid para 144.
[301]Currie and de Waal (note 51 above) 341 – 342.
[302]The Constitution s 12. 's 12(1) – Everyone has the right to freedom and security of the person, which includes the right -
a. Not to be deprived of freedom arbitrarily or without just cause;
b. Not to be detained without trial;
c. To be free from all forms of violence from either public or private sources;
d. Not to be tortured in any way; and
e. Not to be treated or punished in a cruel, inhuman or degrading way'.
[303]Currie and de Waal (note 255 above) 271.

between the deprivation and a worthy purpose.[304] The State deprives an inmate of his right to liberty due to a valid punitive purpose to create a safe environment for the citizens. The procedural aspect is in line with the legislation that dictates the mechanisms for detention and the conditions.[305]

The constitutional rights extracted in the table below represents the most relevant rights that are impacted by the three identified correctional centre conditions. These rights are by no means a closed list and other correlative rights may be infringed upon in the course and scope of the rights violations by the correctional centre condition concerned.

[304]Currie and de Waal (note 255 above) 271 – 272.
[305]Ibid 272.

Table 1: Inmates' Rights in Relation to the Three Identified Correctional Centre Conditions

	THREE IDENTIFIED CORRECTIONAL CENTRE CONDITIONS IN THE CONEXT OF MY DISSERTATION		
	1. OVERCROWDING	2. GANGSTERISM AND SEXUAL VIOLENCE	3. ACCESS TO HEALTHCARE FACILITIES
MOST SUITABLE INMATES' RIGHTS AS INFORMED BY THE CONSTITUTION[306]	**S 35(2)(e)** –'Everyone who is detained, including every sentenced prisoner has the right to conditions of detention that are consistent with *human dignity*, including at least *exercise* and the provision, at state expense, *of adequate accommodation, nutrition, reading material* and medical treatment.'	**S 35(2)(e)** –'Everyone who is detained, including every sentenced prisoner has the right to conditions of detention that are consistent with *human dignity*, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment.'	**S 35(2)(e)** –'Everyone who is detained, including every sentenced prisoner has the right to conditions of detention that are consistent with *human dignity*, including at least exercise and the provision, at state expense, *of* adequate accommodation, nutrition, reading material and *medical treatment*.'
	S 14 – 'Everyone has the right to *privacy*.'	**S 12(1)** – 'Everyone has the right to *freedom and security of the person*, which includes the right - a. Not to *be deprived of freedom* arbitrarily or without just cause; b. Not to be *detained without trial*; c. To be *free from all forms of violence* from either public or private sources; d. Not to *be tortured* in any way; and e. Not to be treated or punished in a *cruel, inhuman or degrading way*.'	**S 27(1)** – 'Everyone has the right to have access to - a. *Health care services*, including reproductive health care; b. Sufficient food and water; and c. Social security, including, if they are unable to support themselves and their dependants, appropriate social services. The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights.'

[306]All rights in this table have been extracted verbatim from the Constitution Act 108 of 1996, chapter two of the Bill of Rights and are subject to the limitation clause (s 36) in the course and scope of their application.

			S 27(3) – 'No one may be refused *emergency medical treatment.*'
	S 27(1) – 'Everyone has the right to have access to - d. *Health care services*, including reproductive health care; e. Sufficient *food and water*; and f. Social security, including, if they are unable to support themselves and their dependants, appropriate social services. (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights.'	**S 13** – 'No one may be subjected to *slavery, servitude or forced labour*.'	**S 35(2)(f)** – 'Everyone who is detained, including every sentenced prisoner has the right to communicate with, and be visited by, that person's – (i) Spouse or partner; (ii) Next of kin; (iii) Chosen religious counsellor; and (iv) Chosen *medical practitioner.'*
	S 35 (3)(d) – 'Every accused person has the right to a *fair trial*, which includes the right to have their trial begin and conclude *without unreasonable delay*.'	**S 18** – 'Everyone has the right to *freedom of association*.'	

2.6. Inmates' Statutory Rights

In terms of complying with the DCS' constitutional obligations of enforcing inmates' rights, regulating correctional centres and recognising international law, legislation and regulations have been promulgated. Inmates' statutory rights are detailed in terms of the Correctional Services Act (CSA)[307], Correctional Services Regulations[308] and DCS staff are guided by the B Order.[309] The Correctional Services Act has withstood many amendments from its inception to the years leading

[307]Correctional Services Act 111 of 1998 as amended.
[308]Correctional Services Regulations 2004 as amended on 25 April 2012.
[309]The capacity orders that are referred to here are the B Order B2 Chapter 2 Paragraph 2.1. 'B Order' are detailed instructions to correctional officials for the implementation of the Regulations to the Correctional Services Act 111 of 1998. These regulations provide for the accountability and consistency of the DCS.

up to its current application.[310] The application of this statute is subject to the Constitution of the Republic of South Africa.[311] In addition to the CSA and legislation, other legislation are also useful such as the Combating of Torture act[312] discussed later in chapter four of this dissertation.

It is apparent from the founding provisions of the Correctional Services Act that the primary purpose of the correctional system is to:

> contribute to maintaining and protecting a just, peaceful and safe society by –
>
> (a) Enforcing sentences of the courts in the manner prescribed by this Act;
> (b) Detaining all inmates in *safe custody whilst ensuring their human dignity*; and
> (c) Promoting the social responsibility and human development of all sentenced offenders.[313] (My emphasis).

Upon admission of an inmate to a correctional centre, the first port of call is for the inmate to be furnished with a written copy of the rules regulating his treatment, discipline, complaints procedures and any ancillary information that will empower the inmate to be fully conversant with his rights and correlative obligations.[314] The next section specifically details the relevant sections of the CSA, regulations and B Order under the three identified correctional centre conditions.

2.6.1. Inmates' Statutory Rights in relation to Overcrowding

The Correctional Services Act stipulates under a heading entitled accommodation that: 'Inmates must be held in cells which meet the requirements prescribed by regulation in respect of floor space, cubic capacity, lighting, ventilation, sanitary installations and general health conditions. These requirements must be adequate for detention under conditions of human dignity'.[315] Thus, the Act refers the reader to the regulations that elaborates on the specific cell requirements as follows:

[310]Correctional Services Act 111 of 1998 as amended. Please see list of amendments as annexed to the bibliography hereto.
[311]Correctional Services Act Preamble.
[312]The Prevention of Combating and Torture of Persons Act 13 of 2013.
[313]Correctional Services Act Chapter 2 s 2(a) – (b).
[314]Ibid s 6(4) (a).
[315]Correctional Services Act s 7(1).

Regulation 3 (1) In every Correctional Centre provision must be made for the general sleeping and in-house hospital accommodation, consisting of a single or communal cells or both.

2 (a) All cell accommodation must have sufficient floor and cubic capacity space to enable the inmate to move freely and sleep comfortably within the confines of the cell.

b. All accommodation must be ventilated in accordance with the National Building Regulations SABS 0400 of 1990 issued in terms of Section 16 of the Standards Act, 1993 (Act No. 29 of 1993).[316]

c. Any cell utilized for the housing of inmates must be sufficiently lighted by natural and artificial lighting so as to enable an inmate to read and write.

d. (i) In every Correctional Centre there must be sufficient, accessible ablution facilities that must be available to all inmates at all times.

(ii) Such facilities include access to hot and cold water for washing purposes.

(iii) In communal sleeping accommodation ablution facilities must be partitioned off.

a. (i) Every inmate must be provided with a separate bed and with bedding which provides adequate warmth for the climatic conditions and which complies with hygienic requirements as prescribed by the Order.[317]

It is clear from merely perusing the aforementioned regulations that these were the requirements that the Constitution contemplated in terms of its reference to 'adequate accommodation'.[318] Under the umbrella of the right to accommodation, comes the inherent right to be provided with food, clothes and toiletries. The Act and Regulations are very cognisant of these basic needs.[319]

2.6.2. Inmates' Statutory Rights in relation to Gangsterism and Sexual Violence

The sub-heading contained in Chapter 3 of the Correctional Services Act is rather thought provoking as it encapsulates the very essence of my debate – 'Custody of *all* inmates under *conditions of human dignity*'.[320](My emphasis) The legislation is very clear in this respect and does not require extrinsic evidence or the vices of the Interpretation Act.[321] The legislation places

[316]L Muntingh *Prisons in a Democratic South Africa – A Guide to the Rights of Inmates as Described in the Correctional Services Act and Regulations* CSPRI (2006) (revised 2010) 17. Available at <http://cspri.org.za/publications/research-reports/Prisons%20in%20a%20Democratic%20South%20Africa%20-%20a%20Guide%20to%20the%20Rights%20of%20Prisoners%20as%20Described%20in%20the%20Correctional%20Services%20Act%20and%20Regulations.pdf> Muntingh clarifies that for adult inmates the Standard for Ventilation is 8.5m3.

[317]Correctional Services Regulations 2004 as amended on 25 April 2012 reg 3(1) and 3(2).

[318]The Constitution s 35(2) (e).

[319]Correctional Services Act s 8, 9, 10, and Correctional Services Regulations 2004 as amended reg 4, 5 and 6.

[320]Ibid Chapter 3.

[321]Interpretation Act 33 of 1957.

a mandatory duty on the State to 'take such steps as are necessary to ensure the safe custody of the inmate and to maintain security and good order in every correctional centre'.[322] Most importantly, the Act states: 'The minimum rights of inmates entrenched in this Act must not be violated or restricted for disciplinary or any other purpose'.[323] It is important to note that correctional centres have a disciplinary mechanism for inmates that commit assault, admits to being a gang member and partakes in gang related activities.[324] Thus, the specific inmates' rights affected are freedom and security of a person as highlighted in section 12 of the Constitution.

2.6.3. Inmates' Statutory Rights in relation to Access to Healthcare

The Correctional Services Act clearly states that an inmate has a right to adequate medical treatment:

> 12. (1) The Department must provide, within its available resources, adequate health care services, based on the principles of primary health care, in order to allow every prisoner to lead a healthy life.
> (2) (a) Every inmate has the right to adequate medical treatment but no prisoner is entitled to cosmetic medical treatment at State expense.
> (b) Medical treatment must be provided by a medical officer, medical practitioners or by a specialist or health care institution or person or institution identified by such medical officer except where the medical treatment is provided by a medical practitioner in terms of subsection (3).
> (3) Every inmate may be visited and examined by a medical practitioner of his or her choice and, subject to the permission of the Head of Correctional Centre, may be treated by such practitioner, in which event the inmate is personally liable for the costs of any such consultation, examination, service or treatment.
> (4) (a) Every inmate should be encouraged to undergo medical treatment necessary for the maintenance or recovery of his or her health.
> (b) No inmate may be compelled to undergo medical examination, intervention or treatment 'without informed' consent unless failure to submit to such medical examination, intervention or treatment will pose a threat to the health of other persons.
> (c) Except as provided in paragraph (d), no surgery may be performed on a inmate without his or her informed consent, or, in the case of a minor, with the written consent of his or her legal guardian.
> (d) Consent to surgery is not required if, in the opinion of the medical practitioner who is treating the inmate, the intervention is in the interests of the inmate's health and the inmate is unable to give such consent, or, in

[322]Correctional Services Act s 4(2) (a).
[323]Ibid s 4(2) (c).
[324]Ibid s 23(1) (a) – (e).

> the case of a minor, if it is not possible or practical to delay it in order to obtain the consent of his or her legal guardian.[325]

The regulations reaffirms this right to healthcare by providing that the same standard of healthcare that is provided to the community must be afforded to inmates.[326]

2.7. Conclusion

This chapter has set out the framework of rights that are available to inmates. It has identified inmate's foundational and specific constitutional rights as informed by three correctional centre conditions namely overcrowding, gangsterism and sexual violence, and access to healthcare facilities. These identified rights have been directly extracted from international, African regional, constitutional and statutory instruments. Therefore, the question of the existence of inmates' rights cannot be in dispute, and South Africa has correlative obligations. The international, regional and domestic instruments have reinforced the argument that South Africa 'must respect, protect, promote and fulfil'[327] inmates' rights. Therefore, South Africa needs to analyse the treatment of correctional centre conditions and their impact on inmates' rights from international, regional and national perspectives. It is evident from the aforementioned instruments that South Africa bears a more intensified burden in ensuring that the rights of its inmates are protected.

I demonstrate how the three aforementioned correctional centre conditions impact and limit the specific rights canvassed in this chapter, in the next three chapters.

[325]Correctional Services Act s 12.
[326]Correctional Services Regulations 2004 as amended reg 7(1) (a).
[327]The Constitution s 7(2).

CHAPTER 3: THE IMPACT OF OVERCROWDING ON INMATES' RIGHTS

3.1. Introduction

In this chapter, I explore the impact that overcrowding has on inmate's rights. This chapter begins by canvassing the problem of overcrowding as a global phenomenon honing into African regional jurisprudence. Thereafter, a historical background is detailed to allow the reader to grasp the foundational roots of the issue of overcrowding in South Africa. I demonstrate the impact of overcrowding in South Africa taking into consideration the statistics that surface from the Department of Correctional Services (DCS) Annual Reports and the Judicial Inspectorate of Correctional Service (JICS) Reports. This endeavor carefully documents the statistics and traces the trends and patterns that emerge. The extent of the domino effect that overcrowding has on other basic commodities will also be demonstrated. Thus, I draw on key authors in order to investigate the principal causes of overcrowding in the context of remand detainees, minimum sentences and parole. A discussion illustrating the impact that overcrowding has on inmates' rights is presented. A critical analysis of the Constitutional Court's correctional centre reports and an investigation into the role of the South African Human Rights Commission is undertaken. Finally, recommendations are put forth aimed at curbing the impact of overcrowding.

3.2. The Global Challenge of Overcrowding in Correctional Centres

In this section, I briefly mention global statistics and then focus specifically on the African region. Overcrowding is a global phenomenon since the 1990s.[328] Worldwide, correctional centre statistics grew from 8.1 million in 1998 to 9.1 million in 2004.[329] Escalation in the correctional centre population are due to governments' 'get tough' strategies in trying to balance public perceptions of crime. Sarkin documents that 69% of the African continents' inhabitants favour incarceration.[330] Sarkin's book is graced with numerous pages evidencing that the foremost problem that correctional centres experience is overcrowding.[331] Comparing, contrasting and

[328]Sarkin J *Human Rights in African Prisons* (2008) 9.
[329]Ibid.
[330]Ibid 9.
[331]Ibid.

tallying each inmate who faces overcrowding across the African continent over years is a difficult task. Because the reality after all the numbers have been balanced is simple: too many inmates are emerging and correctional centres cannot accommodate everyone.[332]

Tapscott, on the other hand, concisely pinpoints overcrowding as a 'challenge to good prison governance in Africa'.[333] The African continent is plagued with overpopulated correctional centres that do not have commensurate resources to smoothly integrate these numbers into existing correctional centres. Correctional centre overcrowding ranges between 20% in Zimbabwe for instance to greater numbers as high as 116% in Tanzania. Thus, Africa faces the challenge of overcrowding in their correctional centres and it is not a problem that can easily be eradicated in the midst of various root causes as listed below. There is a thread of consequences linked to the correctional centre condition of overcrowding namely the burden that it places on the administration to deliver their mandate as a correctional centre and in turn, the resultant effect that maladministration has on inmate's rights.[334] 'Overcrowding, moreover, tends to have a multiplier effect, aggravating staff shortages and resource constraints and exposing weaknesses in administrative practice'.[335] The chain reaction to overcrowding not only extends to the physical discomfort and invasion of inmates' right to privacy but due to the limited resources, inmates are constantly fighting to gain access to bare necessities and rehabilitative programs. The African continent has existing correctional centres that were built in the colonial era and approximately 50 years later stand as is. The design and physical appearance no longer serve constitutional tenets and in turn exacerbate the correctional centre condition of overcrowding.[336]

The conditions of overcrowding, for instance, were admitted in the 1996 Kampala Declaration on Prison Conditions in Africa.[337] This is clearly indicative of the seriousness of the problem of overcrowding in correctional centres on the African continent. The Kampala Declaration was

[332]Sarkin (note 328 above) 14 – 15.
[333]Tapscott C 'Challenges to Good Prison Governance in Africa' in Sarkin J Human Rights in African Prisons (2008) 73.
[334]Ibid.
[335]Ibid.
[336]Ibid.
[337]Kampala Declaration (note 171 above).

supplemented by the institution of the office of the Special Rapporteur on Prisons and Conditions of Detention in Africa.[338]

The Special Rapporteur, the Honorable Commissioner Med S.K. Kaggwa stated in November 2015,[339] that African correctional centres are not meeting their international human rights obligations. The reasons were underlined as 'overcrowding and poor conditions of detention, poor sanitary conditions, poor nutritional meals, lack of sufficient medical facilities, lack of rehabilitation facilities, a large proportion of the prison populations comprise of awaiting trial inmates, accused and convicted individuals are also often detained in the same cells…'.[340]

Rule 12 of the Nelson Mandela Rules states that one inmate except in cases of 'temporary overcrowding' should occupy individual cells. It highlights that two inmates should not ideally share a single cell. Where communal cells are used, a careful selection of inmates to share the cell must be undertaken with particular vigilance by correctional officials at night.[341]

The European Convention for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment raises the bar to specifying approximately 10 square metres of floor space per inmate. Whereas, the American Public Health Association requires approximately 18.18 square metres per inmate.[342] Clearly, these standards are more cognisant of an inmate's right to accommodation consistent with his right to dignity. Steinberg argues that it is a universal trend for courts to be overly cautious when adjudicating an inmate's constitutional right to accommodation by floor measurements. Extenuating circumstances are always considered.[343]

Steinberg raises a rather interesting debate insofar as constitutional litigation regarding correctional centre overcrowding is concerned. He states that, theoretically, courts are easily able to declare the correctional centre condition of overcrowding as unconstitutional. However, the remedies that they will pose, in practice will be diplomatic and no certain timeframes will be cast in stone. He further argues that the debate of overcrowding lies at the heart of a political battle

[338]Sarkin (note 328 above) 88 – 89. Kampala Declaration (note 171 above).
[339]Activity report of Honorable Commissioner Med S.K. Kaggwa, presented at the 57th Ordinary Session 4 – 18 November 2015 Banjul, The Gambia. ACHPR www.achpr.org.
[340]Ibid 13 para 29.
[341]Nelson Mandela Rules (note 130 above) rule 12.
[342]J Steinberg "Prison Overcrowding and the Constitutional Right to adequate Accommodation in South Africa Paper commissioned by CSVR (January 2005) at 2.
[343]Ibid 2.

where litigation would only play a limited role.[344] I understand that in South Africa, the Constitutional Court is yet to declare that overcrowding is unconstitutional and infringes upon inmates' rights. However, I beg to differ with Steinberg as I believe that constitutional litigation can revolutionise the plight of inmates' rights. This will become more evident to the reader in Chapter five of this dissertation in the analysis of the *Lee* case where overcrowding was discussed in the judgment.

The wave of overcrowding ebbs and flows as the numbers of the correctional centre population grows rapidly. Overcrowding jeopardises any real attempt in trying to weed out its root as a problem that correctional centres face. Thus, the State's mechanisms of good governance are questioned. International encounters have proved that overcrowding does not have one solution to reverse its dire consequences and that other avenues need to be explored in trying to address a recurring problem of such a veracity. The Ouagadougou plan for instance advocates that parole and sentencing mechanisms and timeframes for which cases are brought to trial need to be reevaluated in an attempt to reduce overcrowding. Again, this suggestion requires the efforts of all stakeholders concerned to play an active role in the implementation of such goals as it were.[345]

Drawing from other jurisdictions, Zimbabwe established a community service initiative in the 1990s instead of the conventional correctional centre sentences, for curtailing the inmate population for inmates serving sentences of less than six months. Results reveal that the inmate population has decreased, State finances are being saved and the administration of such an initiative fare much lesser than its remand detention counterpart does. Furthermore, 12 other African countries have followed suit.[346] Can South Africa adopt a mechanism of this nature? A detailed investigation into the historical background of correctional centre overcrowding in South Africa must be undertaken before preempting any recommendations.

[344]Steinberg (note 342 above) 3.
[345]Tapscott (note 333 above) 74.
[346]Ibid.

3.3. Brief Historical Background of Overcrowding in South Africa

Pete advocates that there is an inseparable relationship between the punitive aspect of incarceration and overcrowding. He emphasises the historical trend in South Africa spanning over the colonial, apartheid and democratic eras namely the recurrent problem of overcrowding and remedial anatomy of the problem in correctional centres that are consistently faced generation after generation.[347] Thus, it can be argued that overcrowding is a reasonably foreseeable challenge that correctional centres face in South Africa and that it is a perpetual conundrum that is yet to be reckoned with.

Apartheid contributed to overcrowding of correctional centres in three distinct ways. Firstly, correctional centres were used as a social deterrent that ultimately left a legacy of hatred. Secondly, a large number of persons were incarcerated for petty transgressions. Thirdly, there was the institutionalisation of so called 'Universities of Crime' where rehabilitation had no place.[348] The retrospective words of General Brink before the Hoexter Commission in 1981 echoes a thought provoking comment regarding the contribution of awaiting trial detainees to the problem of overcrowding: 'awaiting-trial prisoners could spend as long as seven weeks in jail and then receive sentences as little as a fine of R4 or 10 days imprisonment'.[349] This scenario is heightened by the simple fact that even historically, inmates could not afford bail. Approximately thirty-five years later, issues of 'remand detainees' and bail resonate as one of the many causes of overcrowding in correctional centres.[350]

Dating back to 1982, prior to the advent of constitutional democracy, statistics reveal that there were 104 622 inmates in South Africa and correctional centres were only built to accommodate 75 576 inmates. The 1983 statistics revealed that South African correctional centre population was overcrowded by 36% costing the country approximately R700 000 daily.[351] Surprisingly, in 2015, more than three decades later, South African correctional centre population (males only) comprises of 155 445.[352] Krugel stated: 'it was not simply the apartheid legal system which lay at the heart

[347]SA Pete 'Holding up a Mirror to Apartheid South Africa Public Discourse on the Issue of Overcrowding in South African Prisons 1980 – 1984 Part 2'(2015) *Obiter* 18.
[348]Ibid 19 – 21.
[349]Ibid.
[350]Ibid 22.
[351]Ibid 25 – 27.
[352]Annual Report of the Department of Correctional Services (DCS) (2014/2015) 29.

of the problem, but the socio-economic condition of the country as a whole'.[353] Thus, the extent of the impact of overcrowding is exposed in the statistics. Years elapse, however, the problem is consistently present. The fundamental question is: what has been done over a period of three decades to address the correctional centre condition of overcrowding and how does overcrowding impact on inmates' rights in a constitutional democracy at present and in the future?

Apartheid was responsible for the conviction of many black South African people for petty offences.[354] The intensity of their punishment heightened when inmates were placed in racially segregated cells. To this day, the truth as to the real correctional centre conditions that were faced by Apartheid's inmates remains a topic that is unspoken of.[355] Desegregation of correctional centres ensued in 1990.[356] Thereafter, South Africa witnessed a dramatic escalation in the correctional centre population of 122% from 80 301 inmates in 1994 to 170 044 inmates in 2001. The increased number of inmates was not harmonised by the exact number of cell beds resulting in a correctional centre condition known as overcrowding.[357]

Judge Fagan in his Judicial Inspectorate for Correctional Services (JICS) report in the 2000 financial year described the state of overcrowding as follows:

> Conditions in prison, more particularly for unsentenced prisoners, are ghastly and cannot wait for long-term solutions. For example, one toilet is shared by more than 60 prisoners; stench of blocked and overflowing sewage pipes; shortage of beds resulting in prisoners sleeping two on a bed whilst others sleep on the concrete floors, sometimes with a blanket only; inadequate hot water; no facilities for washing clothes; broken windows and lights; insufficient medical treatment for the contagious diseases that are rife. The list of infringements on prisoner's basic human rights caused by overcrowding are endless.[358]

It is clear from this succinct paragraph by Judge Fagan that with a single problematic correctional centre condition such as overcrowding, various other problems proliferate. As discussed below, the JICS reports nearly 10 years later testify to the same problems.[359]

[353]Pete (note 347 above) 29.
[354]A Dissel & J Kollapen *Racism and Discrimination in the South African Penal System* CSVR & PRI (2002) 7 – 8.
[355]Ibid 7 – 8.
[356]Ibid 9.
[357]Ibid 9.
[358]Annual Report of the JICS (2000).
[359]Annual Reports for the JICS 2005 – 2015.

3.4. Current Statistics and Trends extrapolated from DCS and JICS Reports

3.4.1. DCS Reports – Correctional Centre Population and Overcrowding Rates

Amidst this historical vow of correctional centre secrecy, current day correctional centre conditions are also buried behind bars. It is safe to assume that there are various other real life challenges that inmates face to the exclusion of public knowledge thus casting a shadow of doubt on accountability, transparency and reliability of the information neatly presented in State reports.[360] The objectivity of these reports are highly contestable due to bribery and corruption.[361] However, they remain the only source into a correctional centre cell. The DCS report highlighted that 2014 marked 20 years of democracy for South Africa. Overcrowding remains one of the most problematic areas in the institutions of correctional centres worldwide.[362] In lieu of such, South African floor space per inmate can alone be evidence to attest to the cruel, inhuman and demeaning correctional centre conditions that inmate's face, infringing upon their constitutional rights.[363] Acting National Commissioner Modise admits that 'keeping offenders in a humane and safe manner comes with its own challenges'.[364] This is highly ironic as he later alludes to South Africa's additional inter-continental obligations.[365] South Africa is a member of the African Correctional Services Association, which facilitates the enforcement of the execution of relevant treaties and declarations that South Africa has ascribed to.[366]

Below inmate population numbers as extracted from the Annual DCS reports from 2010 up to 2015 are tabulated.[367] Where the total population was not indicated in the DCS reports, an average was presented instead. Thus, the table below at best represents the approximate number of inmates in correctional centres. Any variances in the data has been explained. This evidences the inconsistencies that surface from State reports in accounting for South Africa's correctional centre population.

[360]MS Thobane & FJW Herbig 'Getting To Them And Through Them: Practical Challenges Of Conducting Research With Incarcerated Offenders' (2014) 1 *Acta Criminologica* 16.
[361]Ibid.
[362]Annual Report of the DCS (2013/2014) 9.
[363]Ibid 2.
[364]Ibid 15.
[365]Ibid.
[366]Ibid.
[367]Annual Report of the DCS from 2010 – 2015.

Table 2: South Africa's Male Correctional Centre Population from 2010 – 2015[368]

YEAR:	SENTENCED MALE INMATES	UNSENTENCED MALE INMATES	TOTAL MALE INMATES	INCREASE OR DECREASE IN SENTENCED MALE INMATES	INCREASE OR DECREASE IN UNSENTENCED MALE INMATES	TOTAL INCREASE OR DECREASE IN MALE INMATES
2014/ 2015	113 236	42 209	155 445[369]	8 030	(1 644)	**6 386**
2013/ 2014	105 206	43 853	149 059[370]	2 720	(889)	**1 831**
2012/ 2013	102 486	44 742	147 228[371]	(7 823)	(126)	(7 949)
2011/ 2012	110 309	44 868	155 177[372]	(405)	(1 926)	(2 331)
2010/ 2011	110 714	46 794	157 508[373]			

Upon closer inspection of the figures of male sentenced and unsentenced inmates over the past five years, it is clear that there has been a sharp escalation in the number of sentenced male inmates from 2013 – 2015. This has influenced the total number of male inmates, to increase by 8 217 inmates in 2014/2015. The male unsentenced inmates are decreasing annually, however, by a very marginal number that does not exceed more than 2000 inmates. It must be highlighted that the total number of males in 2010/2011 was at a very high population rate, taking approximately three years

[368]Please note that the statistics regarding female inmates have been specifically excluded due to the scope and limitations of my dissertation.
[369]Annual Report of the DCS (2014/ 2015) 29.
[370]Annual Report of the DCS (2013/ 2014) 27.
[371]Annual Report of the DCS (2012/ 2013) 33.
[372]Annual Report of the DCS (2014/2015) 28. Average statistics extrapolated from Annual Report of the DCS (2014/2015) 28 as the 2011/2012 report failed to clearly indicate the exact number of males and females in their diagram on page 22.
[373]No available statistics were available in the Annual Report of the DCS (2010/2011). Thus, average statistics were extrapolated from Annual Report of the DCS (2014/2015) 28.

to reach under the 150 000 mark and in a span of a year (2014/2015) reverted to over the 150 000 mark. This clearly illustrates that overcrowding has not improved drastically over the past five years and has actually remained approximately the same, growing consistently.

It must be highlighted that the 2015/2016 DCS report states that there is a total inmate population of 161 984 (total of 157 791 male inmates - 44 100 unsentenced male inmates and 113 691 sentenced male inmates) with an approved bed space of 119 134.[374] This would mean that South Africa's correctional centres are overcrowded by approximately 42 850 inmates who do not have bed space.

South Africa has two hundred and forty three (243) correctional centres. It is noteworthy that fifteen (15) remand facilities of the total number of correctional centres in South Africa were only established across all the provinces in 2014/2015.[375] Therefore, this accounts for the decrease in remand detainees (unsentenced detainees or awaiting trial detainees) of 1 644 in 2014/2015.

In order to address the issue of remand detention, the expenditure reveals that in the 2012/2013 financial period, R247 599 000 was actually spent. Whereas the amount of R507 384 000 was actually spent in the 2013/2014 financial period.[376] Upon closer inspection, it is clear that more than double the amount of money was spent in 2012/2013 than in 2013/2014. This budget has accounted for the sudden decrease in remand detainees. The difference almost amounts to that of the bad debts amount that was written off.[377]

These statistics show that the number of remand detainees comprises of approximately one third of the total male inmate population. This evidences that one of the causes of overcrowding is the influx of remand detainees. Remand detainees will be discussed later in this chapter. I analyse the total overcrowding rate as illustrated in the table below.

[374]Annual Report of the DCS (2015/2016) 30.
[375]Annual Report of the DCS (2014/2015) 29.
[376]Annual Report of the DCS (2013/2014) 17.
[377]Ibid.

Table 3: South Africa's Total Correctional Centre Population and Rate of Overcrowding from 2010 – 2015

YEAR	TOTAL INMATES	TOTAL OVERCROWDING RATE
2014/2015	159 563[378]	32%[379]
2013/2014	152 554[380]	29.7%[381]
2012/2013	150 608[382]	28.48%[383]
2011/2012	158 790[384]	35.95%[385]
2010/2011	161 096[386]	34.87%[387]

The aforementioned table demonstrates that South Africa's total population inclusive of female inmates (who represent a very small percentage of the inmate population) are overcrowded by an average of over 30%.[388] In 2011/2012, South Africa's correctional centres were overcrowded by 35.95%. The President of South Africa, in commemorating Freedom Day in 2012, granted special remission to certain classified categories of inmates.[389] A projection of releasing 14 651 sentenced

[378]Annual Report of the DCS (2014/2015) 29.
[379]Ibid 52.
[380]Annual Report of the DCS (2013/2014) 27.
[381]Ibid 45.
[382]Annual Report of the DCS (2012/2013) 33.
[383]Ibid 62.
[384]Annual Report of the DCS (2011/2012) 22.
[385]Ibid 55.
[386]No available statistics were available in the Annual Report of the DCS (2010/2011). Thus, average statistics were extrapolated from Annual Report of the DCS (2014/2015) 28. Annual Report of the JICS (2010/2011) 10 – 14 documented the following information. The joint capacity of these centres can only hold 118 154 inmates, but realistically as at 31 March 2011, 160 545 inmates are being housed. Of these 160 545 inmates, 47 880 inmates are remand detainees and the remaining 112 683 are sentenced inmates. This essentially means that, close to a third (29, 82%) of the total population are remand detainees. The statistics further reveal that the most number of inmates are detained in Gauteng with the highest level of overcrowding at 172.65%. Johannesburg Medium A, for example, has a capacity of 2630 inmates and currently holds 6118 remand detainees and only 150 sentenced inmates evidencing a 238.33% capacity. The crux of the remand detainee numbers lie in Gauteng with 37.47% exceeding the three-month mark.
[387]Annual Report of the DCS (2010/2011) 50.
[388]Annual Report of the DCS from 2010 – 2015.
[389]In terms of s 84(2) (j) of the Constitution. Media Statement of the Justice Crime Prevention and Security Cluster on Special Remission of Sentence. 27 April 2012. Available at <http://www.dcs.gov.za/docs/landing/Media%20statement%20of%20the%20JCPS%20cluster.pdf>
Guidelines for the Implementation of the Special Remission of Sentence announced by the President on 27 April 2012. Available at <http://www.dcs.gov.za/docs/landing/Guidelines%20for%20implementation.pdf>
Department of Correctional Services: Special Remission of Sentence 27 April 2012.
Available at <http://www.dcs.gov.za/docs/landing/New%20Age%20HALF%20PAGE.pdf>

inmates and 20 855 probationers, in line with the guidelines for implementation, was planned to reduce overcrowding by a staggering 14%.[390] This accounts for the sharp decrease in the correctional centre population in 2012/2013 period. The statistics above reveal that there is a steady climb in numbers to 32% in 2015. Therefore, the correctional centre population is reaching the 160 000 mark yet again. This growth in correctional centre population figures shows a dangerous trend, considering that 'during 2014/2015, fifteen (15) dedicated remand detention facilities were established across the country'.[391] Therefore, the DCS boasts of its improvements yet their own inconsistent statistics reveal the truth that not much is being done. As if this were the case, the statistics would reveal a steady decrease in years to come.

The DCS statistics further reveal that the most number of inmates are detained in Gauteng with the highest number of sentenced and unsentenced offenders amongst all the provinces. In 2014/2015, there were 24 830 sentenced inmates and 10 009 remand detainees in the Gauteng region. The total number of 34 899 represents a fifth of South Africa's total correctional centre population.[392]

It is interesting to note Kriel's research utilising the Annual DCS Reports to forecast the rate of exponential growth in correctional centre population. He observed that from 1956/57 to 2003/4, the number of daily average inmate population escalated from 41 220 to 184 576. This increase shows a 348% increase over a 48-year period. Using this data, he estimated that by 2004/05, the inmate population will stand at 200 000 and further that in 2036/37, there will be more than half a million inmates (504 315).[393] Kriel documents that the actual inmate population for the 2002/03 and 2003/04 financial years as 181 553 and 184 576 inmates respectively.[394] Comparison of these numbers to the 2014/2015 financial year (as above in Table 3) where there was a total of 159 563 inmates, it shows that over a period of approximately a decade, the total correctional centre population has decreased to less than 160 000. Thus, Kriels' estimations were incorrect when

[390]Ibid.
[391]Annual Report of the DCS (2014/2015) 29.
[392]Annual Report of the DCS (2014/2015) 29.
[393]J. Kriel 'Emerging Trends among the South African Inmate Population and Persons Subject to Community Corrections' (2005) 18(2) *Acta Criminologica* 102 – 103. Of course, this estimation is calculated on the basis that the efforts by DCS, legislation and the crime rate continue as is.
[394]Ibid 102.

compared to the actual statistics, as South Africa's correctional centre population has not yet reached the 200 000 inmate mark, but overcrowding is still a challenge though.

It is evident from the above table that the impact of the special remissions on overcrowding did not prove to be a revolutionary solution. The rate of reoffending compensated in a short space of time replenishing the correctional centre numbers to their former state. Therefore, this short-term generosity of the president cannot eternally cure the problem of overcrowding. Actually, in my opinion, it exacerbates the scenario and allows the recidivism rate to plunge into an all-time high. Therefore, there is an urgent need to combat and mitigate overcrowding in correctional centres by DCS to avoid an infringement of human rights caused by overcrowding.

It is imperative to compare the DCS statistics in the reduction of overcrowding rates of adults to that of child inmates.

Child inmates constituted 0.18% of South Africa's inmate population in the 2015/2016 period. There are 99 child remand detainees of the total 41 873 inmates and 187 sentenced child inmates of the total 116 954 inmates. Male child inmates constitute 97.21%.[395] There are 279 male children incarcerated between the ages 14 to 18 years, 8 437 male youth inmates aged between 18 to 20 years and 146 511 male inmates 21 years and older (including adults). This means that the total male population for 2015/2016 was 155 227 inmates.[396] Notably, the child inmate population has been steadily decreasing in number due to the enactment of the Child Justice Act [397]that became operable in 2010. This drastic decrease in child inmates in demonstrated in Table 4 below.

[395]DCS 'Third Annual Report: Implementation of the Child Justice Act 75 of 2008' (2015/2016) 4. Available at <http://www.dcs.gov.za/Publications/>
[396]Ibid.
[397]Child Justice Act 75 of 2008. Date of Commencement 1 April 2010.

Table 4: South Africa's Child Inmate Population (inclusive of female inmates) from 2000 to 2014

Year:	Child Remand Detainees:	Sentenced Child Inmates:	Total:
2000	2 229	1 681	3 910
2001	2 042	1 711	3 753
2002	2 255	1 796	4 051
2003	2 324	1 802	4 126
2004	1 912	1 698	3 610
2005	1 332	1 233	2 564
2006	1 144	1 095	2 239
2007	1 196	892	2 087
2008	928	870	1 799
2009	696	854	1 550
2010[398]	346	658	1 004
2011	366	552	918
2012	367	417	784
2013	241	296	537
2014	167	253	402[399]

Looking at the statistics, it is evident that in 2003, there was a total of 4 126 child inmates. Ten years later, this number has substantially reduced to 402 child inmates which is approximately 10 times less. The number of inmates reduced to 1004 in 2010 when the Child Justice Act came into operation. This number has steadily decreased to below the 500 inmate mark within five years of the commencement of the Child Justice Act. In 2015/2016, the average number of child inmates had decreased to 99. Thus, amounting to an 80.4% decrease.[400]

DCS has substantially reduced South Africa's child inmate population as compared to the statistics canvassed in Table 2 and 3 above.

3.4.2. JICS Reports

The Judicial Inspectorate is established and empowered in terms of Chapter IX of the Correctional Services Act. The institution of the office of the Judicial Inspectorate under the auspices of the Inspecting judge is independent from the DCS.[401] The primary object of JICS is 'to facilitate the

[398]The Child Justice Act defines child as 'any person under the age of 18 years and, in certain circumstances, means a person who is 18 years or older but under the age of 21 years whose matter is dealt with in terms of section 4 (2)'.
[399]Statistics extrapolated from DCS 'Third Annual Report: Implementation of the Child Justice Act 75 of (note 395 above) Annexure A, 16.
[400]Ibid 5.
[401]Correctional Services Act s 85(1).

inspection of correctional centres in order that the Inspecting Judge may report on the treatment of inmates in correctional centres and on the conditions in correctional centres'.[402] Chapter X of the CSA also makes provision for Independent Correctional Centre Visitors (ICCVs) and Visitors Committees.[403]

One of the roles of JICS is the collection of reliable statistics, investigation and reporting back and the prevention of rights violations.[404] The independence of JICS is highly questionable due to the fact that it is financially dependent on the DCS. This scenario is not morally ideal. The public's perception of JICS as an independent body with inmates' rights at heart will be severely compromised and issues of undue influence by DCS will inevitably surface.[405] However, the institution of JICS is critical in the vital running of correctional centres in South Africa. My investigation proves that JICS observations are more open, transparent and accountable than that of DCS. However, the Office of the Judicial Inspectorate faces its own challenges such as staff shortages.[406]

The late Inspecting Judge Skweyiya, in his opening address, attested to the fact that, as at June 2015, South Africa's correctional centres are overcrowded by 150%.[407] Further, JICS have severely criticised the B Order as antiquated and not correlative to the present statutory framework. Annually, JICS raises concerns regarding the fact that South Africa's correctional centre population exceeds the actual available correctional centre space.[408] There are also concerns regarding fundamental budgetary constraints, correctional centre conditions and the dire consequences for the community. However, none of the DCS' attempted solutions have markedly reduced the problem of overcrowding. Despite the fact that the correctional centre population is levelled at a consistent capacity over the last 10 years, it is noteworthy to mention that subsequent to 1995, the number of inmates escalated to an all-time high of 190 000 in 2002/2003.[409]

[402]Correctional Services Act s 85(2).
[403]Correctional Services Act s 92 – 94.
[404]Annual Report of the JICS (2013/2014) 19.
[405]Ibid 20.
[406]Ibid 23 – 29.
[407]Annual Report of the JICS (2014/2015) 8.
[408]Annual Report of the JICS (2013/2014) 41.
[409]Ibid.

The statistics found in the DCS reports differ from those found in the JICS reports. A critical examination of the JICS statistics relating to bail for remand detainees is illustrated in table 5 below. A detailed evaluation of remand detainees appears in the next section as one of the primary causes of overcrowding.

Table 5: Bail Amounts in relation to the Number of Remand Detainees

BAIL CATEGORIES	TOTAL
500 Rand or Less	3339
500 – 1 000 Rand	2334
1 001 – 2 000 Rand	1082
2 001 - 5 000 Rand	589
>R5 000	124
Total	7468 [410]

In the 2014/2015 period, 5 673 inmates were in correctional centres, the majority being those who had been granted bail, as they are unable to afford bail in an amount set between R500 to R1 000. There were only 124 out of the 7 468 inmates who could not afford bail whose bail amount exceeded R5 000.[411]

JICS argues in their 2014/2015 Annual report that the determination of bail payable by a remand detainee is within the ambit of the presiding officer and that bail must be affordable. The presiding officers play an important role in bail matters and must occasionally reconsider the accused's financial circumstances where bail set has not been paid.[412] JICS investigates and reports the unpaid bail statistics to the public. JICS has documented that as at 31 April 2015, 7468 inmates (which is approximately 17% of the remand detainee population) are being detained due to unaffordable bail amounts. SAPS, NPA and the court systems are being called upon by JICS to heed to these numbers by ensuring that justice is served.[413]

[410]Annual Report of the JICS (2014/2015) 46.
[411]Ibid.
[412]Annual Report of the JICS (2014/2015) 45.
[413]Ibid.

JICS has noted that the DCS' intervention in reducing the number of remand detainees was a cumbersome and expensive process: appointing a task team, drafting the White Paper, amending the legislation and administratively implementing these changes. DCS' remand detention efforts have managed to consistently alleviate the remand inmate population just below the 45 000 inmate mark. Nonetheless, correctional centres admit approximately 300 000 remand detainees annually. JICS has recommended that, in spite of DCS' efforts, the legislation that allows DCS to regulate the numbers of inmate population should be used.[414]

Therefore, JICS advises that the DCS must utilise the power bestowed on it in terms of section 49G of the Correctional Services Act. This section urges the head of the correctional centre to refer to the court, any remand detainee who has spent more than two years incarcerated from the date of admission to a remand detention facility. Thus, the court has the discretion to determine whether the remand detainee must continue to be incarcerated or whether a conditional order for release can be made.[415] DCS is in possession of information regarding remand detainees such as health records, family contact details and the behavior of the inmate. JICS has found that DCS has drafted name lists for these type of referrals to court. However, the problem is that these names are not supported by substantive additional information obtained from SAPS and NPA to inform the courts of their recommendations to balance the interests of justice and reconsider bail.[416]

The Judicial inspectors have found 'little evidence' that DCS uses section 63A of the Criminal Procedure Act.[417] This section allows for the correctional centre's head to release inmates on bail where conditions (such as overcrowding) poses a 'material and imminent threat to the human dignity, physical health or safety of the accused'.[418] JICS argues that DCS does not wish to utilise

[414]Annual Report of the JICS (2014/2015) 42.
[415]Ibid 42 – 43.
[416]Ibid 43.
[417]The Criminal Procedure Act as amended Act 51 of 1977. Annual Report of the JICS (2013/2014) 43.
[418]Section 63A of the Criminal Procedure Act '(1) If a Head of Correctional Centre contemplated in the Correctional Services Act, 1998 (Act 111 of 1998), is satisfied that the correctional centre population of a particular correctional centre to is reaching such proportions that it constitutes a material and imminent threat to the human dignity, physical health or safety of an accused-
(a) who is charged with an offence falling within the category of offences-
(i) for which a police official may grant bail in terms of section 59; or
(ii) referred to in Schedule 7;
(b) who has been granted bail by any lower court in respect of that offence, but is unable to pay the amount of bail concerned; and
(c) who is not also in detention in respect of any other offence falling outside the category of offences referred to in paragraph (a), that Head of Correctional Centre may apply to the said court for the-

section 63A as it would implicitly admit that a certain correctional centre or section of a correction centre is overcrowded to such a degree that this condition 'constitutes a material and imminent threat to the human dignity, physical health or safety'[419] of inmates.[420]

JICS inspected 90 of 243 correctional centres, which represents 37% of South Africa's correctional centres. The inspection recorded that 61 of the 90 correctional centres inspected (68%), had more than 100% occupancy. Upon closer analysis of the statistics, 5 correctional centres had more than 200% occupancy level and 16 correctional centres had more than 150% occupancy levels.[421] The remaining 63% of South Africa's uninspected correctional centres occupancy levels are yet to reveal the truth of the actual extent of overcrowding in South Africa.

As at 31 March 2015, there were 113 625 sentenced inmates and 12 709 of them sentenced to life.[422] This means that one ninth of the total population has to live in a correctional centre for a life sentence. South Africa's minimum sentencing laws do not allow for early parole, which stifles the overcrowding rate.[423]

The JICS 2015/2016 report revealed that Johannesburg Medium A, a remand detention facility showed a marked improvement in reducing its overcrowding rate. The Head of the Correctional Centre worked closely with SAPS, NPA and the courts to turn around a severely overcrowded correctional centre. In 2004/05, Johannesburg Medium A housed 7 077 inmates, overpopulated by 269%. JICS found in 2008/2009 that the inmate population had substantially decreased to 6 317 inmates being 240% overcrowded. As at April 2015, JICS inspected the correctional centre and recorded that there were 3 005 inmates, overpopulated by 114%.[424] The Head of Correctional Centre for Johannesburg Medium A attributed the decrease in inmates to 'a hands-on management approach and an excellent collaborative relationship he had with the justice cluster in the area'.[425]

(aa) release of the accused on warning in lieu of bail; or
(bb) amendment of the bail conditions imposed by that court on the accused'.
[419]Section 63A(1) of the Criminal Procedure Act.
[420]Ibid 43.
[421]Annual Report of the JICS (2014/2015) 51 – 52.
[422]Ibid 46.
[423]Ibid 47.
[424]Annual Report of JICS (2015/2016) 48.
[425]Ibid 49.

However, JICS raised its concerns regarding the severe overcrowding in Johannesburg Medium B and Pollsmoor Remand Centre. Johannesburg Medium B is overcrowded by 233% which amounts to a shortage of 1 736 beds. Pollsmoor Remand Centre is recorded as the most overcrowded with a rate of 251%. This means that Pollsmoor Remand Centre has 2 448 beds short.[426] The impact that overcrowding has on inmates' rights, more specifically in the Pollsmoor Correctional Centre will be discussed below.

3.5. Causes and Contributory Factors of Overcrowding:

3.5.1. Remand Detention as a Primary Cause of Correctional Centre Overcrowding

The Deputy Regional Commissioner (Mr D.J Klaas) in the Pollsmoor Report offered some of the reasons for overcrowding: delayed investigation after arrest; numbers of persons accused of petty crimes are kept in remand facilities; delays in criminal trials; unaffordable bail; and compulsory minimum sentences all contribute to an excessive inmate population.[427] An example of the reality of remand detainees not being in a position to pay a minimal amount of R50 for petty crimes was emphasised. Therefore, there is an increased influx of remand detainees, which ultimately places a strain on space and resources.[428]

Remand detainees, as defined in chapter one of this dissertation, are unsentenced or awaiting trial detainees and are innocent until proven guilty.[429] Before delving into the critical analysis of remand detainees in the context of my dissertation, it is imperative to mention that this subsection does not seek to document a fully fledged debate on remand detainees in respect of bail and pre-trial mechanisms. This study is intricate and goes beyond the scope of my dissertation. This section provides a precursory, rather elementary analysis with a focus on the White Paper on Remand Detention as a primary cause of overcrowding.

[426]Annual Report of JICS (2015/2016) 49.
[427]Justice Cameron *Pollsmoor Correctional Centre – Remand and Women's Centre Constitutional Court of South Africa* (23 April 2015) 6 para 16. Available at www.constitutionalcourt.org.za (Hereinafter referred to as 'Pollsmoor Report').
[428]Ibid.
[429]DCS *White Paper on Remand Detention Management in South Africa* March (2014) 8 and 10. Available at <www.dcs.gov.za>.

Remand detainees significantly contribute to overcrowding as detailed in the statistics and trends section above.[430] Due consideration must therefore be paid to the new legislation that has emerged namely: the Correctional Matters Amendment Act 5 of 2011.[431] The Act provides a new framework for the management and detention of remand detainees and inserts new definitions for the protection of remand detainees in the Correctional Services Act.[432] There have been various developments and initiatives by the DCS to manage remand detention. One of which is the allocation of dedicated remand detention facilities strategically placed near courts, to assist in expediting the judicial procedures.[433] The Act now allows a remand detainee to be monitored every six months, to document progress and inform all members concerned.[434] No remand detainee may be incarcerated for more than two years unless a court declares such in light of all the surrounding circumstances.[435] The Correctional Services Act has been amended to make provision for the establishment of remand detention facilities [436] and the Minister has issued a Notice regarding the establishment of remand detention facilities in specific regions.[437] If the criminal justice system in South Africa expediently concluded trials, South Africa would not need to infringe on remand detainee's and sentenced inmate's rights by causing a domino effect of correctional centre conditions.

The White Paper for Remand Detention supplements the 2005 White Paper on Corrections and is highly cognisant of the fact that remand detainees occupy a third of the correctional centre population.[438] Two of the primary issues are insufficient remand detention facilities and skills specific trained staff members to execute new policies.[439]

Can the White Papers' strategies for reducing overcrowding be a workable solution? This is highly contestable and requires the full cooperation of all the aforementioned stakeholders in order to make a minor change to the overall overcrowding problem. While the White Paper sounds

[430]C Ballard *Research Report on Remand Detention in South Africa: An overview of the Current Law and Proposals for Reform.* CSPRI Community Law Centre (2011) 4.
[431]Correctional Matters Amendment Act 5 of 2011.
[432]Ibid s 1.
[433]WJP Conference (note 24 above) 4 – 5.
[434]Correctional Matters Amendment Act s 49G.
[435]WJP Conference (note 24 above) 6.
[436]Correctional Services Act s 5(2) (a).
[437]General Notice 148 Correctional Services Act (111/1998): Establishment of remand detention facilities GG335071.
[438]White Paper for Remand Detention (note 429 above) 10.
[439]Ibid 10 – 11.

promising, I believe that active, concerted and continued efforts by the State, community and stakeholders must be undertaken. I am not entirely optimistic that all of the suggestions in the White Paper are workable solutions. It is arguable that 'Audio Visual Remand' program (allowing remand detainees to electronically postpone their trial dates) is flawed.[440] Cameron J asks a vital question in relation to this video technology: 'Does the video technology deprive detainees of confidential access to a lawyer?' [441] It must be emphasised that a remand detainee has a constitutional right to legal representation.[442] Therefore, DCS' attempts to reducing overcrowding must by all means be practical and not infringe on remand detainee's constitutional rights. Remand detainees have the same constitutional rights as enlisted in Chapter 2 of the Constitution including the powers of having these rights limited to a lesser extent. [443] Regional and international instruments specifically protect remand detainees' rights.[444] The inverse debate is also applicable; remand detainees rights cannot be favoured and given priority to the detriment of sentenced offenders. The State needs to place these two categories of inmates' rights at an equilibrium. Whether innocent or guilty, inmates' rights must not be curtailed by the correctional centre condition of overcrowding.

3.5.2. Minimum Sentencing, Life Sentences and Eligibility for Parole

In the 1990s, compulsory minimum sentences were introduced as a political solution to crime.[445] In 1997, the Criminal Law Amendment Act 105 of 1997[446] was enacted due to the increased crime statistics in South Africa. The rationale behind the legislation was to send out a message that courts intend to enforce stricter sentences for inmates who commit specific serious crimes. Thus, protecting South African citizens.[447] The purpose of the Criminal Law Amendment Act as stated

[440]White Paper on Remand Detention (note 429 above) 20.
[441]Pollsmoor Report 8 para 20.
[442]Section 35 2(b) – (d) of the Constitution which states: 'Everyone who is detained , including every sentenced prisoner, has the right – (b) to choose, and to consult with, a legal practioner, and to be informed of this right promptly; (c) to have a legal practioner assigned to the detained person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of hid right promptly; (d) to challenge the lawfulness of the detention in person before a court and, if the detention is unlawful, to be released'.
[443]White Paper on Remand Detention (note 429 above) 39 – 41.
[444]Articles 4, 5, 6 and 7 of the African Chapter on Human and Peoples Rights, section 9, 10 and 11 of the ICCPR.
[445]Muntingh L 'Sentencing' in C Gould (In)Justice in South Africa A Civil Society Perspective (2009) 178.
[446]Criminal Law Amendment Act 105 of 1997. Date of commencement: 13 November 1998.
[447]Ibid 179. SM Roth 'South African Mandatory Minimum Sentencing: Reform Required' (2008) 17(1) *Minnesota Journal of International Law* 155.

in its Preamble is to set aside the death sentence, which the Constitutional Court has found to be unconstitutional and substitute it with other lawful punishments.[448] Section 51[449] imposes a minimum period of incarceration for specified crimes unless the Court is able to find 'substantial and compelling reasons', in which case a lesser sentence is imposed.[450] Therefore, four-fifths of a sentence or 25 years must be served by a life sentenced inmate before being considered for parole.[451]

Roth argues that mandatory minimum sentencing does not prevent violent crimes or reduce inequalities in sentencing inmates. It in fact causes correctional centre overcrowding and perpetuates 'procedural delays'.[452] It is clear from Table 2 above that sentenced male inmates form the majority of the inmate population as compared to the remand detainees. In 2014/2015, the sentenced male inmates increased by 8 030 since the previous financial year.[453] As at 2015/2016, there were 113 899 sentenced inmates as opposed to the 41 327 remand detainees.[454]

Justice Fagan argues that 'the growth in sentenced prisoners is being fueled by a dramatic increase in the length of prison terms'.[455] In January 1998 (before the implementation of the minimum

[448]Criminal Law Amendment Act 105 of 1997. Preamble.

[449]The Criminal Law Amendment Act, Section 51: 'Discretionary minimum sentences for certain serious offences (1) Notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person it has convicted of an offence referred to in Part I of Schedule 2 to imprisonment for life.(2) Notwithstanding any other law but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person who is convicted of an offence referred to in; (a) Part II of Schedule 2, in case of-(i) a first offender, to imprisonment for a period not less than 15 years; (ii) a seconder offender of any such offence, to imprisonment for a period not less than 20 years; and (iii) a third or subsequent offender of any such offence, to imprisonment for a period of 25 years; (b) Part III of Schedule 2, in case of –(i) a first offender, to imprisonment for a period not less than 10 years; (ii) a second offender of any such offence, to imprisonment for a period not less than 15 years; and (iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 20 years; and (c) Part IV of Schedule 2, in case of – (i) a first offender, to imprisonment for a period not less than 5 years; (ii) a second offender of any such offence, to imprisonment for a period of not less than 7 years; and (iii) a third or subsequent offender of any such offence, to imprisonment for a period of not less than 10 years; Provided that the maximum term of imprisonment that a regional court may impose in terms of this subsection shall not exceed the minimum term of imprisonment that it must impose in terms of this subsection by more than five years. (3)(a) If any court referred to in subsection (1) and (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and must thereupon impose such lessor sentence: Provided that if a regional court imposes such a lesser sentence in respect of an offence referred to in Part 1 of Schedule 2, it shall have jurisdiction to impose a term of imprisonment for a period not exceeding 30 years.

[450]Ibid.

[451]Muntingh (note 445 above) 185. Section 73(6)(b)(v) of the Correctional Services Act 111 of 1998.

[452]Roth (note 447 above) 163 – 164.

[453]Annual Report of the JICS (2014/2015) 29.

[454]Annual Report of the JICS (2015/2016) 32.

[455]H Fagan 'Curb the Vengeance: Laws on Minimum Sentencing and Parole spell worsening Prison Conditions'(2004) December 10 *South African Crime Quarterly* 1.

sentencing legislation), there were 76% of inmates serving less than 3 to 10 years sentences and only 24% of inmates serving more than 10 year sentences. In 2004, 52% of inmates were serving less than 3 to 10 years and 48% of inmates were serving more than 10 year sentences. Therefore, the number of inmates sentenced to more than 10 years increased by 24% within six years.[456] The reality of the situation is that sentenced inmates including those sentenced to life are increasing and these inmates have to serve longer terms. Additional admissions of new sentenced inmates compounds the number of sentenced inmates already in correctional centres. Thus leading to an exponential growth of overcrowding.[457]

The next section deals with two cases namely the *Van Vuren*[458] and *Van Wyk* [459]judgments that consider the longer periods that life-sentenced inmates have to serve due to eligibility for parole considerations. In the Constitutional case of *Van Vuren*, Mr Van Vuren was serving a life sentence in the Pretoria Central Correctional Centre. On 13 November 1992, he was convicted on various counts of murder, amongst others, where the death sentence was imposed. Mr Van Vuren launched a High Court parole application as he had already served 15 years of the sentence.[460] The Provincial Commissioner of Correctional Services advised Mr Van Vuren that he had to serve 20 years of his sentence before being considered for parole and that no credits would be taken into consideration.[461]

Section 136 (3)(a)[462] would apply to inmates sentenced to life incarceration during the period of 1 March 1994 or 3 April 1995, entitling these inmates to be considered for parole after 20 years.

[456]Fagan (note 455 above) 2.
[457]Ibid 3 – 4. Roth (note 447 above) 175.
[458]*Van Vuren v Minister of Correctional Services and others* (2010) ZACC 17.
[459]*Van Wyk v Minister of Correctional Services and Others* (40915/10) (2011) ZAGPPHC.
[460]*Van Vuren v Minister of Correctional Services and others* (note 458 above) para 6.
[461]Ibid para 7.
[462]Section 136 of the CSA states: (1) Any person serving a sentence of incarceration immediately before the commencement of Chapters IV, VI and VII is subject to the provisions of the Correctional Services Act, 1959 (Act No. 8 of 1959), relating to his or her placement under community corrections, and is to be considered for such release and placement by the Correctional Supervision and Parole Board in terms of the policy and guidelines applied by the former Parole Board prior to the commencement of those Chapters. (2) When considering the release and placement of a sentenced offender who is serving a determinate sentence of imprisonment as contemplated in subsection (1), such prisoner must be allocated the maximum number of credits in terms of section 22A of the Correctional Services Act, 1959 (Act No. 8 of 1959).(3) (a) Any prisoner serving a sentence of life incarceration immediately before the commencement of Chapters IV, VI and VII is entitled to be considered for day parole and parole after he or she has served 20 years of the sentence. (b) The case of a offender contemplated in paragraph (a) must be submitted to the National Council which must make a recommendation to the Minister regarding the placement of the offender under day parole or parole.(c) If the recommendation of the National Council is favourable, the Minister may order that the offender be placed under day parole or parole, as the case may be.(4) If a person is sentenced to life incarceration after

Section 136(1) allows for inmates sentenced to life (like Mr Van Vuren) before 1 March 1994 or 3 April 1995, to preserve their position as coached in the old Act.[463] Thus, the guidelines applicable are those that were operational on 13 November 1992 allowing Mr Van Vuren to serve 10 years his sentence. The Constitutional Court held that Mr Van Vuren was eligible to be immediately considered for release and correctional supervision.[464] Therefore, Mr Van Vuren spent an additional five years incarcerated without being considered for parole. This duration of time impacts on the number of sentenced inmates in a correctional centre, contributing to overcrowding.

Similarly, in the *Van Wyk* case, the applicant was convicted on 3 counts of murder, amongst others. On 5 September 2004, Mr Van Wyk was sentenced to life for each of the counts of murder. He had already served 16 years of his sentence.[465] Mr Van Wyk was sentenced under the Correctional Services Act 8 of 1959. Section 64 of this Act provided that life sentenced offenders cannot be released on parole unless the National Advisory Council makes a recommendation to the Minister.[466] Section 64 was repealed by the Correctional Services Act 111 of 1998, effective from 1 October 2004. Mr Van Wyk was sentenced in September 2004. At this time, a life sentenced offender was required to serve 20 years before consideration for parole.[467]

This case deals with the retrospective effect of inmates' rights.[468] Acting Judge Hiemstra considered the aforementioned *Van Vuren* case and found the Correctional Service Order BVI(1A)(22)[469] to be unconstitutional and held further that Mr Van Wyk and other offenders serving life sentences before 1 October 2004 are entitled to a parole date after due consideration

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the commencement of Chapters IV, VI and VII while serving a life sentence imposed prior to the commencement, the matter must be referred to the Minister who must, in consultation with the National Council, consider him or her for placement under parole or day parole. Section 136 of the Correctional Services Act. Date of Commencement of s136: 19 February 1999.

[463]*Van Vuren v Minister of Correctional Services and others* (note 458 above) para 59.

[464]Ibid para 74 – 78.

[465]*Van Wyk v Minister of Correctional Services and Others* (note 459 above) para 1.

[466]Ibid para 4 – 5.

[467]Ibid para 6.

[468]Ibid para 13.

[469]This B Order stated: '(a) The conditional placement of this category of prisoners is determined by Section 64 of the Act. (b) The term "life" means exactly what the words imply, namely for the duration of the prisoner's natural life to be in detention or be in the community under supervision.(c) A prisoner sentenced to life imprisonment must serve at least 20 years of his/her sentence before his/her placement on day parole/parole can be considered by the National Advisory Council on Correctional Services.(i)-(iv) ..... (d) The consideration date cannot be advanced by credits allocated'. Ibid para 14.

of credits earned in terms of the Correctional Services Act 8 of 1959[470] and to be considered for parole in terms of the DCS policy.[471]

On 29 June 2017, Minister Michael Masutha briefed media highlighting the 'length about parole consideration for lifers, political offenders and review of the parole system'.[472] Minister Masutha expressed his concern with the influx of court cases lodged by life sentenced inmates alleging that he did not expeditiously process inmates' parole applications. He clarified the eligibility of life sentenced inmates for parole as canvassed in the the *Van Vuren* and *Van Wyk* judgments. In the *Van Vuren* case, inmates sentenced to life before 1 October 2004, after serving a period of 20 years were entitled to be considered for parole. 369 inmates belonged to this category and the minister confirmed that 276 were placed on parole.[473]

The collective result of the president's special remission in 2012 and the *Van Vuren* and *Van Wyk* judgments allowed for the *Van Wyk* category of inmates to be due for parole much earlier. There are 1 412 inmates in this category who have already been considered for parole. The Minister had also advised that consultations were underway regarding a Position Paper on Parole Administration in an attempt to change the country's parole system.[474]

In December 2014, a Ministerial Task team on Political Offenders was established to determine whether presidential pardons can be granted for inmates who committed political crimes. A total of 2 109 applications were received where 149 inmates were recommended for presidential pardon.[475]

The *Van Vuren* and *Van Wyk* cases have an impact on sentenced inmates' rights to be released and considered for parole. This would have a direct bearing on overcrowding, the number of life sentenced inmates and their duration in correctional centres. Due to the strict minimum sentencing and parole legislation, life sentenced inmates who are eligible for parole and are not being released

[470]Section 22A(2) of the Correctional Services Act 8 of 1959. 'The number of days and months earned by a prisoner as credits may be taken into account in determining the date on which a parole board may consider the placement of such a prisoner on parole'.
[471]*Van Wyk v Minister of Correctional Services and Others* (note 459 above) para 27.
[472]DCS, Minister Michael Masutha 'Minister Masutha updates Nation on Key Developments in DCS'. Available at <http://www.dcs.gov.za/docs/2017%20doc/Minister%20Masutha%20updates%20nation%20on%20key%20developments%20in%20DCS.pdf>
[473]Ibid.
[474]Ibid.
[475]Ibid.

(as illustrated in the *Van Vuren* and *Van Wyk* cases), spend more time in correctional centres which causes and contributes significantly to overcrowding. The impact of sentenced inmates in a correctional centre are compounded when more sentenced inmates are admitted annually. The long sentences served by inmates in correctional centres causes overcrowding and parole considerations of eligible inmates can decrease overcrowding. The Minister's statistics reveal that if all the aforementioned categories of inmates are released, the correctional centre population would be reduced by 3 890 inmates.[476] Many other cases are likely to emerge and rely on the Constitutional Court's tenets in the *Van Vuren* case.[477] However, sentenced and life sentenced inmates still contribute to overcrowding in correctional centres.

3.6. The Extent of the Impact of Overcrowding on Inmates' Rights

> First, all aspects of life are conducted in the same place and under the same authority. Second, each phase of the member's daily activity is carried out in the immediate company of a batch of others, all whom are treated alike and required to do the same thing together. Third, all phases of the day's activities are tightly scheduled, with one activity leading at a prearranged time to the next, the whole sequence of activities being imposed from above by a system of explicit formal rulings and body of officials. Finally, the various enforced activities are brought together in a single rational plan purportedly designed to fulfil the official aims of the institution.[478]

It is clear from the aforementioned quotation that the very nature of being incarcerated limits an inmate's right to freedom. In essence, this means that their every action will be within the confines of the same space, with other inmates and under the constant control of correctional officials.[479]

South Africa's capacity orders stipulate that the average communal cell is to occupy a minimum floor space of $3.344m^2$.[480] The reality is that South Africa does not in fact comply with its own capacity standards. Evidence of overcrowding reveals that approximately 40 – 60 inmates occupy

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[476]Ibid.
[477]See *Minister of Correctional Services and others v Seganoe* (20507/2014) (2015) ZASCA 148 (01 October 2015).
[478]E Goffman *Asylums: Essays on the Social Situation of Mental Patients and Other Inmates* (1973) London Penguin First published in 1961 at 16 – 17.
[479]Ibid.
[480]Correctional Services Regulations 2004 as amended .The capacity orders that are referred to here are the B Order B2 Chapter 2 Paragraph 2.1. 'B Order are detailed instructions to correctional officials for the implementation of the Regulations to the Correctional Services Act 111 of 1998. These regulations provide for the accountability and consistency of the DCS.' L Muntingh *Prisons in a Democratic South Africa – A Guide to the Rights of Prisoners as Described in the Correctional Services Act and Regulations* CSPRI (2006) (revised 2010) Available at <http://cspri.org.za/publications/research-reports/Prisons%20in%20a%20Democratic%20South%20Africa%20-%20a%20Guide%20to%20the%20Rights%20of%20Prisoners%20as%20Described%20in%20the%20Correctional%20Services%20Act%20and%20Regulations.pdf> <http://www.communitylawcentre.org.za/cspri/index.php> <http://intranet.dcs.gov.za/orders/border/order2/Chapter%2011-01.htm> 24 February 2005.

a single communal cell for 23 hours a day, reducing the floor space per inmate to less than $1.4m^2$. The exact size can be compared to that of a standard office desk within which they are expected to eat, sleep and live.[481]

The following practical example is useful in illustrating the challenge that overcrowding poses and its impact on inmates' rights.

A minibus taxi stops at the taxi rank and his taxi can only legally accommodate 15 passengers. Thus, 15 passengers equates to 100% capacity. Can we load another additional 15 passengers into the taxi that would now be overcrowded by 200%? The simple answer is no, as all 30 passengers cannot realistically fit into the taxi. Why? For the sake of emphasising my argument, the following common sense problems would occur:

1. No space due to high occupancy levels;
2. Not enough ventilation in terms of oxygen/ aircon/windows;
3. The taxi would be carrying a heavier load and be required to drive at a lower speed. This would mean that the journey would take much longer;
4. Risk of being apprehended by a traffic officer is high;
5. People's lives are in danger, the taxi can break down and have an accident;
6. Some people would be required to stand and standing in a moving vehicle poses a risk of falling;
7. If one person has the flu and sneezes, the risk of contracting germs are increased;
8. The weight, height and age have a bearing on the seating arrangements in the taxi;
9. The duration of the journey would impact on discomfort experienced by the passengers;
10. Passengers luggage brought on board will affect the overall space considerations;
11. Aspects of hygiene, comfort and legroom are compromised;
12. The entire activity is illegal due to the weight and capacity restrictions imposed by the State;

[481]Annual Reports of JICS (2005/2006), (2006/2007) and (2007/2008)10 – 14, <http://judicialinsp.pwv.gov.za/Annualreports/annualreport.asp> and SJ Robertson, SD Lawn, A Welte, LG Bekker & R Wood 'Tuberculosis in a South African Prison – A Transmission Modeling Analysis' (2011) 101(11) *South African Medical Journal* 809.

13. The passengers are expected to pay the fee tariffs despite the aforementioned factors that amount to the rendering of a poor service.

Not to mention the other unforeseen challenges such as a motor vehicle accident, severe thunderstorms or winds, potholes on the road or weight restrictions whilst crossing a bridge. If a simple commute to work in an overcrowded taxi is practically impossible for an hour or two by a free citizen, how can an inmate live in similar conditions if not worst for a sentence of five years for example in a confined space of a few metres squared? Therefore, I would like to argue that any form of exposure to overcrowding curtails an inmates' rights and as such an inmate faces a myriad of other challenges due to the condition of overcrowding.

Just like the passenger, above, has to pay for the service so do taxpayers for inmates. Thus, a more disquieting concern includes the fact that law-abiding citizens are obliged to pay taxes, to ultimately contribute to the preservation of inmates. The 2014/2015 DCS report confirms that the daily per capita cost of just the incarceration program of a single inmate (remand detainee or sentenced offender) amounts to approximately R 207.71.[482] With the burden of overcrowded correctional centres, in order for taxpayers to maintain 159 563 inmates, it would tally to an approximate compound amount of *R33 million for only one day*.[483] If inmates live in such poor conditions, what happens to taxpayer's money in the DCS? Is the criminal justice system solely to blame or corrupt correctional officials tucking into the funds allocated to ensure that the rights of inmates are realised?

3.7. Addressing the Challenge of Overcrowding

The White Paper on Remand Detention is an optimistic document that has been put in place to address the problem of remand detention in South Africa, which would in turn reduce overcrowding.[484] I would like to argue that it is still a 'paper' as it stands in black and white. Theory

[482]Annual Report of the JICS (2014/2015) 18 and 29. The calculation was R12 097 188 00(amount for the incarceration program) divided by 159 563 (total number of correctional centres which gave us the value of the annual incarceration being R75 814.49 per inmate. This amount was then divided by 365 days to give us an amount of R207.71 per day, per inmate. The amount of the total cost of incarceration for the total number of inmates was calculated as follows: R207.71 (cost per day) multiplied by 159 563 (total number of inmates) which equated to R33 14 28 30.73(rounded off to approximately R33 million).
<http://judicialinsp.pwv.gov.za/Annualreports/annualreport.asp>
[483]Annual Report of the JICS (2014/2015) 18 and 29.
[484]White Paper on Remand Detention (note 429 above).

and the practical realisation of the words on the paper are two separate analogies. However, it is clear that a commendable document displaying a concerted effort to address remand detention cannot be solely attributed to DCS. Hence, it is noteworthy to state that various stakeholders made a meaningful contribution to the White Paper on Remand Detention.[485] The DCS, Constitutional Court and South African Human Rights Commission have tried to address the issue of overcrowding. The section that follows considers their efforts (findings, trends, statistics and limitations) and documents the impact that overcrowding has on inmates' rights.

3.7.1. DCS' Role in addressing Overcrowding

3.7.1.1. DCS' Fruitless and Wasteful Expenditure

Upon closer inspection of the Annual DCS Reports, an item in their Annual Financial Statements listed as 'Fruitless and Wasteful Expenditure' is worth noting as encapsulated in the table below.

Table 6: DCS' Total Monetary Loss for 'Fruitless and Wasteful Expenditure' for 2011 – 2015

YEAR	AMOUNT LOST TO 'FRUITLESS AND WASTEFUL EXPENDITURE'
2011/2012	R 71 377 000[486]
2012/2013	R 34 754 000[487]
2013/2014	R 8 058 000[488]
2014/2015	R 35 628 000[489]
Total	R 149 817 000

[485]These stakeholders included Justice, Crime, Prevention and Security Cluster (JCPS), Department of Justice and Constitutional Development, Legal Aid Board, the SAPS, universities; representatives of the Portfolio Committee on Correctional Services, Parole Board, Inspecting Judge, Parole Advisory Board, the Judiciary and National Council of Correctional Services. Several Non-profit organizations such as NICRO, CSPRI, KHULISA, and Institute for Security Studies amongst others were active role-players. The Wits Justice Project and many ex-inmates consulted in November 2012 in the process of brainstorming the White Paper on Remand Detention. White Paper on Remand Detention (note 429 above) 8.
[486]Annual Report of the DCS (2011/2012) 159.
[487]Annual Report of the DCS (2012/2013) 152.
[488]Annual Report of the DCS (2013/2014) 132.
[489]Annual Report of the DCS (2014/2015) 163.

The DCS confirmed that there was a total amount of R35 628 000 lost as at 31 March 2015 for 'fruitless and wasteful expenditure'.[490] This is a massive amount of taxpayers' money that was squandered on overseas trips that were cancelled, fines, interest and staff members not attending scheduled training.[491] This is a highly unacceptable state of affairs and can be deemed as a violation of inmates' rights as illustrated further below. In 2011/2012 an amount of R71 377 000 was lost. This is almost half the amount of wasteful expenditure of the four-year period in the above table that was lost in one year. However, the total amount lost over a four-year period of approximately 1.5 billion rands is deplorable. An amount of 1.5 billion rands can be utilised in a more constructive manner to adequately address the problem of overcrowding. For instance, DCS could build, renovate or fix correctional centres that do not meet the minimum standards, buy beds, sheets, toiletries, food, employ more medical staff, create programs that address gangsterism, supply TB and ARV medication. The list is endless and this money could make a very noticeable difference in the lives of inmates if budgeted for the dire necessitates of inmates than be squandered by a handful of staff members. Crime rates surge into the future and little is being done to manage the intake of inmates into these institutions bursting at the seams. The extent of the infringement by DCS on inmates' rights is distinctively apparent from my observation.

3.7.1.2. DCS' use of 'Electronic Tagging/Monitoring'

Upon analysing the Annual DCS Reports from 1997 – 2015, a period of approximately 18 years, I have made the following observation regarding electronic monitoring. The DCS implemented the 'electronic monitoring/tagging' system in an effort to reduce overcrowding. The 1997 DCS report confirms that the first electronic monitoring system was pioneered in the year 1997. This is the year that the system was first implemented in Pretoria and was successful in testing the device for house arrests. The decision was to expand such implementation in 1998.[492] In 1998, the pilot project was planned to be extended to other countries.[493] There was a lapse of approximately 14 years in omitting to address the developments of the electronic monitoring program in their Annual

[490]Annual Report of the DCS (2014/2015) 163.
[491]Ibid 20.
[492]Annual Report of the DCS (1997) 4.
[493]Annual Report of the DCS (1998) 8 – 9.

Reports. Then, in the 2011/2012 DCS Report, mention of the Electronic monitoring system surfaced and was to be 'implemented on 14 February 2012' for parolees.[494]

In 2012/2013, the Electronic Monitoring Pilot Project (EMPP) was launched to address the problem of the increased number of remand detainees. The cost management estimated that in 2012/2013, a taxpayer would pay R9 876.35 per month to maintain an inmate whereas the EMPP reduced this cost to R3 379 per month. Minister Ndebele even highlighted the advantages of such a system to reducing overcrowding, as having 24-hour control of inmates and the monitoring of their every action will be communicated to the correctional services control room.[495] In the 2013 /2014 Annual DCS Report, the following as quoted verbatim was stated: 'The DCS has learnt that one way to manage the inmate population is to utilise technology, such as electronic monitoring. Electronic tagging is aimed at enhancing public safety, which enables the Department to monitor offenders and awaiting trial persons, throughout the country, 24-hours-a-day'.[496] This very same quotation (cut and paste) appeared in the 2014/2015 Annual DCS Report. However, 18 years later, the EMPP is still being referred to as an 'introduction' to reduce overcrowding. This is a shocking and embarrassing state of affairs. The fact that a mere 604 inmates have been electronically tagged in 2014/2015 is highly unacceptable.[497] If the EMPP was implemented in 1997, I doubt that only 604 inmates should be electronically tagged in 2014/2015. The number of inmates that should be projected to be tagged must be higher (in lieu of the fact that more than 150 000 inmates are being housed in South Africa's correctional centres) if this is posited by the DCS as a realistic solution to addressing overcrowding.

It can be argued that the electronic monitoring has been a pilot project for approximately 18 years and was only properly introduced in 2015. The aforementioned sweeping statements appeared in the Minister's address/foreword of their respective reports. Therefore, anyone who reads the Minister's statement at the beginning of the Annual Report will be convinced that overcrowding is under control by virtue of the EMPP and that DCS is making a concerted effort to address overcrowding. This is not the case and is a misrepresentation of the facts. Electronic monitoring

[494]Annual Report of the DCS (2011/2012) 13.
[495]Annual Report of the DCS (2012/2013) 12 – 13.
[496]Annual Report of the DCS (2013/2014) 9.
[497]Annual Report of the DCS (2014/2015) 9.

can possibly be a viable but not the only solution to relieve overcrowding which has been backlogged for 18 years.

Van Der Merwe documented that DCS conducted a study in 1997 to establish whether electronic monitoring could be a viable method to manage and monitor community corrections.[498] The advantages of electronic monitoring in community corrections is that inmates need not be physically monitored by correctional officials and an inmate can leave his home with the device attached to his ankle whilst still being monitored. At the time, DCS envisaged the implementation of electronic monitoring countrywide for approximately 10 000 inmates annually. The thought process was to address community corrections via electronic monitoring first which would in turn alleviate overcrowding.[499] The pilot project resulted in a 98% success for holding inmates. In September 1996 to August 1997, 155 inmates were tagged and only three escaped.[500] During the Pretoria pilot project, six judicial officers were interviewed, supporting the use of electronic monitoring as a reason 'to reduce prison overcrowding.'[501] Van Der Merwe supports the use of electronic monitoring as 'an aid in enforcing curfews and restraining orders among those sentenced to community corrections'.[502] I agree with Van Der Merwe that using electronic monitoring for community corrections can be successful, thereby reducing the number of inmates in correctional centres.

DCS recognises the importance of electronic monitoring as a tool to reduce overcrowding but is reluctant to implement it. It is evident from the 2014/2015 Annual DCS report that electronic monitoring was included as a performance indictor with a planned target for the financial year entitled: 'Electronic Monitoring integrated with the Community Correctional System'. The status or explained deviation for this performance indicator stated that the 'EM system remains live on the pilot external network environment, not yet migrated into the DCS'.[503] The 2015/2016 Annual DCS report states that the planned target for the 2015/2016 financial period is to tag 1000/78 221 inmates and DCS only achieved tagging 870/78 221 inmates. The reasons for not meeting the

[498]IS Van Der Merwe Department of Corrections 'Prisons without Bars: Electronic Monitoring and Community Corrections' (1999) 18 *Crime and Conflict* 21.
[499]Ibid 22.
[500]Ibid 23.
[501]Ibid 23 – 24.
[502]Ibid 21.
[503]Annual Report of the DCS (2014/2015) 43 – 44.

target were: 'The target could not be achieved due to unavailability of tags (damaged, lost or irreparable) and more referrals from the NCCS and CSBP's and courts'.[504]

Furthermore, in the 2014/2015 Annual DCS report, the Auditor General stated that the Minister made a request for an independent investigation to be concluded to determine 'possible fraud in the awarding of a specific contract to an amount of R296.7 million with regard to the electronic monitoring system of offenders'.[505] The Judicial Inspectorate even expressed their concern by stating that, '[w]ith the introduction of electronic monitoring, it is hoped that increased resources are directed by the Department to this method of releasing inmates'.[506] It can be concluded that with a budget of R19.722 billion (in the 2014/2015 period), R296.7 million of possible fraud relating to EMPP and approximately 1.5 billion rands lost to fruitful and wasteful expenditure, at least a substantial amount needs to be properly budgeted to addressing overcrowding. One of the line items on DCS' budget should be prioritised for electronic tagging as a legitimate effort to reduce overcrowding as alluded to in their reports.

The DCS' Strategic Plan projects overcrowding as a foreseeable risk and aims to address it by implementing a combined approach by all divisions concerned. Some of the plans for reducing overcrowding by 2020 is to instigate 'out of correctional centre sentences', correctional supervision and alternative sentencing. In light of the aforementioned debate, it is ironic that the National Development Plan also recommends the electronic monitoring system to curb overcrowding.[507]

In the current technological era that South Africa is living in, with the introduction of technological advancements such as biometric systems, navigator devices and 5G technology, DCS cannot justify tagging 870 inmates of the more than 150 000 inmates in South Africa's correctional centres. The fact that DCS has failed to adequately implement and maintain a viable solution (one of many solutions) to overcrowding, through electronic tagging, highlights my argument made that it has been derelict in its duties.

[504]Annual Report of the DCS (2015/2016) 71.
[505]Annual Report of the JICS (2014/2015) 109.
[506]Annual Report of the JICS (2014/2015) 44.
[507]DCS Strategic Plan for 2015/2016 – 2019 – 2020 19. Available at <www.dcs.gov.za/sites/www.gov.za/files/national%20strategic%20plan%20on%hiv%20%20stis%20and%t20tb 0.pdf>

3.7.2. The Role of Correctional Centre Visits by Constitutional Court Judges in addressing Overcrowding

A Constitutional Court judge is empowered to visit a correctional centre at any given time.[508] The Justice is then entitled to inspect any part of a correctional centre or any correctional centre record, interview inmates and thereafter, address his/her findings to 'the National Commissioner, the Minister, the National Council or the Inspecting Judge'.[509] The Constitutional Court established a correctional centre visitation and monitoring program in 2009, which became operational in 2010. The program entails having each of the Justices visit specific correctional centres and observe the conditions. The primary objectives of the visits by the Constitutional Court Justices are to familiarise themselves with the correctional centre conditions, assist by monitoring and making recommendations to improve conditions, serve as a medium for feedback and to allow inmates to lodge complaints with the visiting Justice. JICS has supported the Constitutional Court's project as the Justices assist in ensuring that correctional centre conditions are humane.[510] Upon completion of the visit, a report is written and sent to the aforementioned authorities. Thereafter, the reports are published on the constitutional court's website at the end of the year.[511] These reports are a resourceful means to gathering firsthand accounts of correctional centre conditions especially overcrowding and aid in addressing correctional centre conditions. The information presented below shows the Constitutional Court Justices' concerted attempts to address overcrowding. Numerous reports appear on the Constitutional Court's website for the different correctional centres visited by the Justices. Each correctional centre experiences different overcrowding rates and the account below is limited to some of the available reports.

On 27 May 2010, Justice Dikgang Moseneke visited Johannesburg Central Correctional Centre. He was informed that this correctional centre is the country's most overpopulated and has issues of staff shortages. The structure comprises of Medium A, Medium B, Maximum and a female centre. This correctional centre houses offenders from the jurisdictional area of 30 courts in Johannesburg. Thus, overcrowding is reported as a major problem. At the time there were close to

[508]Correctional Services Act s 99 (1).
[509]Correctional Services Act s 99(2).
[510]Constitutional Court Website. 'Constitutional Court Prison Visits' Available at: <http://www.constitutionalcourt.org.za/site//PVisits/PrisonVists.html>
[511]Pollsmoor Report (note 427 above) 2 para 3.

6 000 male remand detainees who were accommodated in a centre that had a capacity to hold 2 630 inmates. Justice Moseneke described this centre as being 'devastatingly overcrowded'.[512]

The Medium A section holds predominantly awaiting trial male offenders. There are 76 inmates occupying a cell that was built to accommodate 38 inmates with one toilet, a shower and a basin. Three people sleep in one bed. The offenders remain in the cells throughout the day. The only exercise they get is when they go to court or collect their food. The officials mentioned that they qualify for exercise but it is neither practical nor possible for them to be allowed to do so because there are so many inmates.[513]

Justice Moseneke documented some of the complaints that he received during the correctional centre visits. Some inmates complained about delayed trials and bail refusal. Offenders have been awaiting trial for eight years. Others complained about having to sleep on 'the cold cement floor', as the cells were overcrowded. Justice Moseneke concluded that overcrowding was the most problematic condition in the Johannnesburg Correctional Centre and attributed overcrowding to court delays in the finalisation of cases, imposition of long sentences, offenders inability to pay bail set, failure to implement alternative sentencing and insufficient resources to release inmates.[514]

Justice Moseneke had also visited Pretoria C-Max Correctional Centre on 25 May 2010.[515] This is one of South Africa's super-maximum correctional centres which houses dangerous high risk inmates who are serving life sentences. Thus, C-Max inmates are treated differently from other correctional centres. 158 inmates are being housed in the Pretoria C-Max correctional centre with 32 sentenced to life incarceration and 21 remand detainees. Each inmate is held in their own cell (with a bed, sink and toilet) as opposed to communal cells. However, these inmates are locked in their individual cells for 23 hours.[516]

The C-Max correctional centre is divided into four sections A, B, C and an awaiting trial detention centre. Section A inmates complained to Justice Moseneke about the following issues: correctional

[512]Justice Moseneke *Johannesburg Correctional Facility Report* (27 May 2010). Available at <http://www.constitutionalcourt.org.za/site//PVisits/PrisonVists.html>
[513]Ibid.
[514]Ibid.
[515]Justice Moseneke *Pretoria C-Max Correctional Centre Report* (25 May 2010). Available at <http://www.constitutionalcourt.org.za/site//PVisits/PrisonVists.html>
[516]Ibid.

officials not enforcing inmates' constitutional rights; inmates 'tortured' by correctional officials upon arrival; inmate doctor's prescriptions of incorrect medication; and issues surrounding the eligibility of parole.[517]

The Pretoria C-Max correctional centre, therefore, does not experience overcrowding as the high security regime allows each inmate to have a single cell. The correctional centre was clean, inmates were healthy and received 'healthy portions of food for lunch which looked nutritious'. Justice Moseneke highlighted his concerns regarding the alleged torture by correctional officials and the length of delays in trial processes.[518]

Justice Sisi Kampepe visited the Leeuwkop Correctional Centre on 22 – 23 July 2010.[519] The correctional centre houses approximately 3 995 inmates. The correctional centre comprises of a youth centre, Medium A, B and C centres and a Maximum Centre.[520]

Medium A can hold 911 inmates but held 1 078 inmates. Medium C can hold 900 inmates but held 1 278 inmates. Sections A, B and C did not have many complaints.[521] The Maximum Centre can hold 763 inmates but held 1 635 inmates.[522] Justice Kampepe cautioned that the Maximum Centre is experiencing serious overcrowding (215% overcrowded) and needs urgent attention.[523]

Justice Kampepe also visited the Witbank Correctional Centre on 28 June 2011.[524] Justice Kampepe was informed at the inception of the visit that Witbank correctional centre does not experience overcrowding for sentenced adults and operates at 98% of its capacity. However, it is overcrowded by 158% for sentenced youth offenders, 187% for adult remand detainees and 229% for youth remand detainees.[525]

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[517] Pretoria C-Max Correctional Centre Report (note 543 above).
[518]Ibid.
[519]Justice Sisi Kampepe *Prison Visit Report Leeuwkop Correctional Centre* (22-23 July 2010). Available at <http://www.constitutionalcourt.org.za/site//PVisits/PrisonVists.html>
[520]Ibid 1.
[521]Ibid 3.
[522]Ibid 4.
[523]Ibid 5.
[524]Justice Kampepe *Prison Visit Report: Witbank Correctional Centre* (28 June 2011). Available at<http://www.constitutionalcourt.org.za/site//PVisits/PrisonVists.html>
[525]Ibid 1.

The complaints received from the youth remand detainees were worn out bedding, long periods awaiting trial and there was one or two showers for all inmates.[526] In the adult remand detainee centre, there was a serious problem of overcrowding, inmates sleeping on the floor and inmates awaiting trial for more than 3 years. Justice Kampepe reported that 'this is quite disturbing and requires an appropriate remedy'.[527] Inmates complained that there was insufficient food, as inmates who were cooks were dishing out smaller portions and unlawfully selling the food.[528]

Justice Kampepe noted that gangsterism has not infiltrated the Witbank correctional centre and that this illustrated the respect between correctional officials and inmates.[529]

Justice Cameron and his team visited Pollsmoor Correctional Centre on 23 April 2015.[530] Justice Cameron reported: 'The extent of overcrowding, unsanitary conditions, sickness, emaciated physical appearance of the detainees, and overall deplorable living conditions were profoundly disturbing'.[531] The Regional Commissioner confirmed that the correctional centre is overcrowded by more than 300% and most of the overcrowding is concentrated in the remand detention facility that was established in 2012.[532]

The correctional centre condition of overcrowding witnessed by the Constitutional Court team were best described as 'shocking', 'appalling' and 'horrendous'.[533] 'There is an average of 65 inmates per cell. The overcrowding is practically, undoubtedly and daily degrading and hazardous for every detainee subjected to it'.[534] The cells were dirty and had 24 beds with 60 inmates sharing or sleeping on the floor.[535] There were no sheets on the beds and the beds were never sanitised in years. Therefore, inmates developed sores and scabies as result of these unhygienic conditions.[536] Inmates have to use one toilet and shower. Ablution facilities were deplorable as toilets did not flush, the bucket system was being used, sinks were used to bath and urinate in.[537] The correctional

[526]Witbank Correctional Centre (note 524 above) 3.
[527]Ibid 4 – 5.
[528]Ibid 5.
[529]Ibid 10.
[530]Pollsmoor Report (note 427 above) 1 para 1.
[531]Ibid 6 – 7 para 17.
[532]Ibid 4 - 6 para 10, 11, 13 and 16.
[533]Ibid 13 para 43 – 44.
[534]Ibid 45.
[535]Ibid 46 – 47.
[536]Ibid 14 para 48, 50 – 60.
[537]Ibid 49 – 50.

centre had no hot water for inmates to shower. There was no natural light, windows were broken and there was a lack of proper ventilation.[538] Furthermore, an inmate was given one blanket that never gets washed and becomes filthy and lice ridden. There were numerous complaints of insufficient food where only two meals were being served; the last meal was served at 13.00pm. The inmates experience hunger pangs throughout the rest of the day.[539]

The report also made mention of a sliver of hope regarding inmates uniform and hygiene. In October 2015, the remand detainees will be given new correctional centre garbs.[540] Another shocking observation of how overcrowding impacted on inmates' rights was the treatment of 40 migrant detainees. These detainees were solely detained on the basis of being undocumented and the law dictates that migrant detainees are to be housed in separate facilities. However, these migrant detainees were living with remand and sentenced inmates.[541]

Justice Cameron recommended that urgent steps be taken so that inmates receive:

1. one hours exercise every day;
2. three meals a day;
3. their own bed;
4. a clean blanket that is periodically washed;
5. hot water to shower once a day;
6. more ablution facilities;
7. proper lighting and ventilation;
8. toiletries and
9. separate migrant detainee facilities.[542]

The issues raised in Justice Cameron's report regarding the impact that overcrowding has on inmate's right to health will be highlighted later in chapter five of my dissertation. These shocking facts prove that overcrowding infringes on inmates' rights to a significant extent and shows that these periodical Constitutional Court reports serve as a vital tool in addressing correctional centre conditions.

[538]Pollsmoor Report (note 427 above) 14 para 51 – 52.
[539]Ibid 16 – 17.
[540]Ibid 30 para 108.
[541]Ibid 19 – 20 para 70.
[542]Ibid 34 – 37.

3.7.3. The Role of the South African Human Rights Commission in addressing Overcrowding

The Constitution enlists the South African Human Rights Commission (SAHRC) as a Chapter 9 institution to strengthen our constitutional democracy.[543] The SAHRC's functions are delineated in section 184 of the Constitution as follows:

> (1) The South African Human Rights Commission must –
>
> (a) promote respect for human rights and a culture of human rights;
>
> (b) promote the protection, development and attainment of human rights; and
>
> (c) monitor and assess the observance of human rights in the Republic.
>
> (2) The Human Rights Commission has the powers, as regulated by national legislation, necessary to perform its functions, including the power –
>
> (a) to investigate and to report on the observance of human rights;
>
> (b) to take steps to secure appropriate redress where human rights have been violated;
>
> (c) to carry out research; and
>
> (d) to educate.
>
> (3) Each year, the Human Rights Commission must require relevant organs of state to provide the Commission with information on the measures that they have taken towards the realization of the rights in the Bill of Rights concerning housing, healthcare, food, water, social security, education and the environment.
>
> (4) The Human Rights has additional powers and functions prescribed by national legislation.[544]

Therefore, SAHRC has a constitutional mandate to promote, monitor and assess human rights in South Africa. These are inclusive of inmates' rights. SAHRC is constitutionally required to investigate and report on human rights violations and take measures to redress human rights violations. Furthermore, SAHRC is annually obligated to monitor the steps taken by State institutions in fostering and ensuring that human rights are realised. Thus, it is within this constitutional mandate that SAHRC must perform its functions in terms of section 184 of the Constitution to protect inmates' rights and investigate correctional centre conditions more specifically monitor overcrowding as a primary cause of inmate conditions.

[543]The Constitution s 181 (1)(b).
[544]The Constitution s 184.

Since the inception of the establishment of the SAHRC in October 1995, a significant number of complaints were received from inmates.[545] The SAHRC embarked on an enquiry entitled the 'Report of the National Prisons Project' because of the steep escalation in the correctional centre population, which dug deep into the State's purse and the limited resources in trying to individually address each of the inmate's complaints. A state of emergency in correctional centres dictated that an intervention be made to curb criminal activities in correctional centres and the growing recidivism rate.[546] The purpose of the 'National Prisons Project' was for the SAHRC to investigate correctional centre conditions in a practical manner, holistically addressing inmates complaints and to offer recommendations for redress in written reports.[547] The *only* 'National Prisons Project' report emerged in 1998, where Barney Pityana was the Chairperson at the time.[548] *No* other reports specifically from the 'National Prisons Project' has been published.[549]

The statistics from the 'National Prisons Project' reveal that overcrowding has posed a problem since the advent of the Constitution. In 1996, the correctional centre population stood at 125 750 and rose by 13% to 142 410 in 1997. In 1996, the correctional centre overpopulation rate was 30.5%.[550] The correctional centre population as at 31 December 1997, being nearly 17 years ago revealed that the total correctional centre population stood at 142 410 with a total of 100 975 sentenced and 41 435 remand detainees.[551] The reality of the scenario of overcrowding is alarming. As nearly 18 years later our statistics today are virtually the same with 159 563 detainees.[552] See table 7 below.

[545]SAHRC *Report of the National Prisons Project of the South African Human Rights Commission* (note 90 above) 3.
[546]Ibid 3 – 6.
[547]Ibid 5 – 6.
[548]Ibid 4 – 6.
[549]See <https://www.sahrc.org.za>
[550]SAHRC *Report of the National Prisons Project of the South African Human Rights Commission* (note 90 above) 11.
[551]Ibid 9.
[552]Annual Report of the DCS (2014/2015) 29.

Table 7: Comparison of Total Correctional Centre Population in 1997 to that in 2015

YEAR	SENTENCED INMATES	REMAND DETAINEES	TOTAL NUMBER OF INMATES
1997[553]	100 975	41 435	142410
2015[554]	116 265	43 298	159 563
Total increase in 18 years	**15 290**	**1 863**	**17 153**

A quick glance at the aforementioned table points to the fact that since the SAHRC 'National Prison Project' report in 1998, the problem of overcrowding persists. The SAHRC has failed to investigate and to report annually under the 'National Prisons Project' for approximately 18 years of South Africa's democracy, regarding the persistent correctional centre condition of overcrowding. Inmate human rights violations were identified in the initial report. The detailed report was central to the realisation of the SAHRC's constitutional mandate to also ensure that inmates' rights are protected. The discontinuance of the 'National Prison Project' reports is problematic in that there is no independent human rights perspective into inmates' rights aside from the DCS and JICS reports. The level of detail canvassed in this report allowed for realistic recommendations to be implemented and for inmates' rights to be protected. To this end, SAHRC have failed to adequately promote, protect and monitor inmates' rights.

The SAHRC documented that in 1996, the correctional centres were overcrowded by 30.5%. As such, inmates' basic necessities such as toiletries and linen were being severely compromised. Inmates were forced to sleep on cement floors with dirty lice infested blankets. Basic amenities such as hot water and electricity were non-existent. Toilets were either too few, filthy, in the open invading inmates' privacy or a health hazard. Due to the large numbers of inmates in a cell, the availability of light and oxygen were inadequate. The SAHRC also documented that the Mdantsane correctional centre experienced a mould problem and had a green fly infestation in the correctional centre cells. Furthermore, due to overcrowding, inmates had to sleep on mats, as there

[553]SAHRC *Report of the National Prisons Project of the South African Human Rights Commission* (note 90 above) 11.
[554]Annual Report of the DCS (2014/2015) 29.

were no beds to accommodate another inmate. The SAHRC found that inmates' rights were infringed upon and described the state of affairs as 'inhumane conditions'.[555]

Back in 1996/1997, the average cost of the upkeep of an inmate was R6.89 per day.[556] Today, it has increased by five times to an average amount of R 207.71 per day.[557] The effect of overcrowding impacts on an inmate's right to food, a bare necessity. The SAHRC report stated that due to overcrowding, inmates complained that there was either no food, not enough food, inedible or expired food. A food shortage in Durban correctional centre demonstrated that 'food was inadequate, half cooked, rotten, unhygienic and sometimes contained lice'.[558] Inmates were forced to buy food from the tuckshop where the food was marked up at high prices. Inmates were forced to sell their bodies in order to obtain a plate of food.[559]

Interestingly, 19 years later, the SAHRC published a 'Civil and Political Rights Report' in March 2017.[560] This report identified overcrowding in South Africa's correctional centres as a violation of inmates' rights.[561] SAHRC highlighted that '[t]he South African state has an added obligation to protect the right to life to those within its care or custody, for example in mental hospitals (or in NGOs undertaking this function), police stations, detention centres and correctional centres'.[562] SAHRC reported that the investigation into the deaths and allegations of torture, cruel, inhuman or degrading punishment in correctional centres is the responsibility of JICS. JICS utilises DCS reports to analyse the unnatural death statistics to report to stakeholders. The SAHRC advises that the electronic mechanism used to convey this data is 'dysfunctional' and impedes on JICS' mandate to oversee correctional centres.[563] Over the past four years, the SAHRC has received complaints from inmates forming part of five topmost rights violations. SAHRC confirms that the complaints mainly relate to inmates seeking assistance with procurement of court transcripts and appealing their convictions or sentences. 'A few complaints related to prison condition.' Few of

[555]SAHRC *Report of the National Prisons Project of the South African Human Rights Commission* (note 90 above) 12 – 13.
[556]Ibid 14.
[557]Annual Report of the DCS (2014/2015) 18 and 29.
[558]SAHRC *Report of the National Prisons Project of the South African Human Rights Commission* (note 90 above) 14.
[559]Ibid.
[560]SAHRC *Civil and Political Rights 2016/2017* (March 2017) Available at: < https://www.sahrc.org.za/>
[561]Ibid 17.
[562]Ibid 18.
[563]Ibid 19.

these complaints are accepted by the SAHRC, as it is alleged that these complaints are referred to Legal Aid South Africa or JICS.[564] The SAHRC contends that the role of JICS is crucial in an efficient criminal justice system and that JICS must act both proactively and reactively. Furthermore, JICS must be strengthened in its mandate being provided with financial support and independence to protect inmates against human rights violations.[565] In this report, the SAHRC expresses it concern regarding overcrowding in South Africa's correctional centres and argues that 'the South African government's lack of concrete response as how it plans to improve conditions and address the dramatic increase in overcrowding'.[566]

The SAHRC makes the following recommendations in addressing overcrowding: address the high number of remand detainees often arrested by SAPS unnecessarily; implement restorative justice; and that basic information regarding life sentenced offenders be furnished by DCS in order to effect reform of life incarceration in South Africa.[567]

From the aforementioned report, the SAHRC has shifted its responsibility of protecting inmates' rights onto JICS and has failed in its constitutional mandate to continue to investigate, report and redress human rights violations as initially anticipated in the 'National Prisons Project'.

3.8. Conclusion

This chapter has demonstrated the extent of the impact that overcrowding has on inmates' rights that are enumerated in chapter two. DCS, JICS, the Constitutional Court and SAHRC reports evidence that overcrowding infringes on inmates' (including remand detainees') foundational rights, rights to adequate accommodation, fair trial, food and privacy. DCS cannot unjustifiably infringe upon an inmate's rights. South Africa does not comply with their international, regional and domestic obligations. It is clear from the aforementioned exposition that DCS and JICS have obligations in terms of managing overcrowding and by failing to meet such a legislative mandate, the State is in actual fact exacerbating overcrowding. No constitutional ruling has been passed to

[564]SAHRC *Civil and Political Rights* (note 560 above) 27.
[565]Ibid 28.
[566]Ibid.
[567]Ibid 33.

declare the correctional centre condition of overcrowding as unconstitutional and this is left to be desired.

Overcrowding is a thread that runs through each of the chapters that follow to demonstrate the intensity of the impact that correctional centre conditions have on inmates' rights.

CHAPTER 4: THE IMPACT OF GANGSTERISM AND SEXUAL VIOLENCE ON INMATES' RIGHTS

4.1. Introduction

In this chapter, I explore gangsterism and sexual violence and its impact on inmates' rights to 'conditions of detention that are consistent with human dignity',[568] right to freedom and security of a person, [569] freedom from slavery, servitude and forced labour [570] and freedom of association[571]as canvassed in chapter two of this dissertation.

The right to freedom and security of a 'free' person differs from that of a detained individual as detention automatically places a limitation on one's freedom. However, the general purpose of section 12 of the Constitution is to protect a person whether free or incarcerated from the State's infringement on the right to liberty and bodily integrity.[572]

A brief background of the global and historical context of gangsterism is presented. Thereafter, an in depth analysis of how gang practices leads to the culture of sexual violence which in turn creates a breeding ground for HIV and AIDS. Rape and reporting of rape in correctional centres is critically assessed in order to establish the extent of the impact of gangsterism and sexual violence on inmates' rights. The case of *Bradley McCallum v South Africa*[573] is critically analysed in the context of my debate on torture as this is a groundbreaking case in South African jurisprudence. The notion of torture is explored in the South African domestic legislative terrain in conjunction with their international counterparts. Thereafter, the DCS and JICS reports will reveal whether the State is meeting its international, regional and domestic obligations. The State's obligations will also be discussed in this chapter.

In this chapter, I do not delve into the intricacies of the transmission of HIV and AIDS via these gang practices or inmates' right to medical care, as this is discussed in chapter five that specifically deals with an inmate's right to access healthcare.

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[568]The Constitution s 35(2) (e).
[569]The Constitution s 12.
[570]The Constitution s 13.
[571]The Constitution s18.
[572]Currie & De Waal (note 255 above) 271.
[573]*Bradley McCallum v South Africa* (McCallum represented by counsel, Egon Aristidie Oswald) 25 October 2010 CCPR/C/100/D/1818/200. (Hereinafter referred to as *Bradley McCallum*).

4.2. The Global Challenge of Gangsterism and Sexual Violence in Correctional Centres

The incidence of gangsterism and use of drugs in correctional centres is a global phenomenon. Latin America for example are governed by drug gangs.[574] Violence originates as a result of these gangs. Statistics reveal that 506 inmates were killed in Venezuela due to gang related crimes.[575] There is a lucrative market for the dealing of drugs in correctional centres although drug use is also significantly prevalent.[576] The United Kingdom also experiences a high incidence of gangsterism and drug peddling of new substances such as 'Spice' and 'Black Mamba'.[577]

The African continent is no exception to gangsterism. The UN Special Rapporteur on torture reported that in Ghana, correctional centre gangs, known as the 'Black Coat' dominate other inmates through the medium of violence.[578]

4.3. Brief Historical Background of South Africa's Correctional Centre Gangs

The infamous book by Jonny Steinberg[579] entitled 'The Number: One Man's search for identity in the Cape underworld and prison gangs', sets out the journey of the historical correctional centre gang leader named Nongoloza Mathebula.[580] Seeking rationalism for the intricate history and symbolism for correctional centre gangs, Herman Charles Bosmon encapsulates in a succinct quote the reality of an inmate's story: 'Touch a long-term prisoner anywhere and a story would flow from him like a wound. They were no longer human beings. They were no longer people, or living creatures in any ordinary sense of the word. They were merely battered receptacles of stories,

[574]Penal Reform International Global Prison Trends (2015) 5. Available at: < https://www.penalreform.org/wp-content/uploads/2015/04/PRI-Prisons-global-trends-report-LR.pdf>
[575]Ibid 23.
[576]Ibid 5.
[577]Ibid.
[578]UN General Assembly, Human Rights Council, 25th Session *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* Juan Emendez: Mission to Ghana, 5 March 2014, /HRC/25/60/Add1.
[579]My research shows that Johnny Steinberg is one of the leading authors in the sphere of attempting to document and research correctional centre gangsterism in South Africa. Steinberg has a reputable track record of fieldwork in correctional centres and personal encounters with gang members in correctional centres. Thus, I will draw upon his key work in my dissertation.
[580]J Steinberg J *The Number One Man's search for identity in the Cape underworld and prison gangs* (2004).

tarnished and rusted containers out of which strange tales issued like djinns out of magical bottles'.[581]

Thus, one limitation posed in my dissertation is that every inmate's story in a gang cannot be codified here neither do gangs have written material in which information can be extrapolated. Furthermore, my choice of research does not necessitate that I gain access into correctional centres to obtain firsthand accounts from gang leaders as this would go beyond the scope of my dissertation. However, my objective is to highlight the essence of the historical gang trends by encapsulating the groundbreaking traditions and practices that were formulated during the Apartheid Era. I argue that gangs and the practice of gangsterism is a correctional centre condition that is firmly rooted in correctional centres.

The number gangs were established more than a century ago. The infamous 26s, 27s and 28s find their origin inside jails, mine compounds and informal settlements. Today, they exist as a force to be reckoned with in a correctional centre environment. Nongoloza Mathebula, a Johannesburg inmate founded an empire by recruiting soldiers to his fictional militia to conceptually resist colonialism and apartheid. Under this disguise, oral tradition dictates that the imaginary armies of inmates and their garbs, ammunition and paraphernalia, symbolised 'the Boer and British armies of the late 19th-century Transvaal'.[582] Steinberg rightly argues that South Africa's knowledge on gangsterism remains at arm's length. It is arguable that correctional centres to this day still conceal the harsh realities of gangsterism behind locked bars and inmates are still under the spell of silence.[583] Limited access to correctional centres and hearsay accounts of gangsterism and sexual violence is a conundrum every researcher faces.[584] DCS and JICS reports offer no substantive truth to the reality of gangsterism in correctional centres. The reports provided by DCS and JICS are limited in their manner of reporting on gangsterism and sexual violence in correctional centres. These reports are superficial, not accurately representing the reality in the statistics.

Nongoloza in a 1912 DCS report stated: 'I reorganized my gang of robbers. I laid them under what was since known as Nineveh law. I read in the Bible about the great state Nineveh which rebelled

[581]Ibid 6.
[582]J Steinberg *Nongoloza's Children: Western Cape prison gangs during and after apartheid* (2004) CSVR 3.
[583]Ibid 4.
[584]Ibid 6.

against the Lord and I selected that name for my gang as rebels against the Government's laws'.[585] This so-called Ninevites gang ended in and around 1910. The rest of the tale is laced with symbolic events that occurred in a village under the auspices of an elderly man fondly known as Po. Po instructed Nongoloza and Kilikijan to buy a bull named Rooiland from a white farmer named Rabie. Rabie refuses and the two men kill the farmer returning to Po with the bull. Festivities then ensued with the slaughtering of the bull. From the remains of the bull, symbolic paraphernalia were extracted such as the hide, hooves and horns. The two men drank the blood of the bull. The skin was used to imprint the law of the gang. Various other rituals were performed and fights ensued. Essentially, three gangs were born namely the 26s, 27s and 28s.[586]

The 26s are moneymakers for all three gangs, making money fraudulently not violently. The 28s are protectors fighting for better correctional centre conditions. 28s can have sex with other 28 gang members not 26 gang members. 28s have a two-pronged hierarchy namely the gold and silver military lines. The gold line fights the gangs wars and the silver line are females. 27s are benefactors of gang laws ensuring that there is a balance of peace amongst the three gangs. 27s spill blood when blood is spilled.[587]

Other newly formulated gangs also exist such as the Airforce 3 and 4 (23s and 24s) whose primary objective is to escape from correctional centres. The Big 5s (25s) collude with correctional officials to procure food and other concessions.[588]

It is shocking to observe that research dating back to the 1980s by Haysom, Lotter and Schurink as to the reality of gangsterism were not used as a foundation to build upon South Africa's research today.[589] It is no surprise that the State is unable to address gangsterism that has existed for more than a century and still haunts South Africa's correctional centres today.

The next section provides an analysis of the causes and contributory factors of gangsterism and sexual violence in correctional centres.

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[585]Steinberg (note 582 above) 8.
[586]Ibid 9 – 15.
[587]Ibid 15 – 16.
[588]S Gear & K Ngubeni *Daai Ding- Sex, Sexual Violence and Coercion in Men's Prisons* CSVR (2002) 5.
[589]Ibid 4.

4.4. Causes and Contributory Factors

4.4.1. Gang Criminology, Traditions and Practices

Steinberg succinctly encapsulates the common gang activities as:

> the world of the Number gangs is one of staggering brutality. Its self-styled judiciaries sentence inmates to death, to gang rape, to beatings with prison mugs, padlocks and bars of soap; among the prerequisites of joining the "soldier lines" of the gangs is the taking of a warder's or non-gangster's blood; leaving a prison gang, sharing a gang's secrets with a warder, or talking casually about the gang's workings to the non-initiated are all punishable crimes.[590]

It is clear from the aforementioned summary by Steinberg that inmates face a vast array of violence (physical, sexual and emotional) and this leads to acquiring communicable diseases.

The current state of affairs in correctional centres is a power struggle amongst gang members who are either drug merchants, powerful individuals who have access to luxuries such as cell phones or even bearers of mere mundane commodities such as soap.[591] A more significant bargaining tool that gang members utilise is sexual violence to advance their status within correctional centres.[592] In confronting these realities, Grobler and Hesselink conducted research into tracing the criminological mindset of an individual adult male gang inmate with the pseudonym Mr X. Mr X who is now 63 years old, is a 26s gang leader and fifth time offender. The study revealed the following factors that contributed to his ongoing violent behavior: an abusive upbringing; estrangement; adoption of criminal and anti-social tendencies; pro-violent mindset; believing harm to others is acceptable; low self-confidence; substance abuse; masking underlying childhood trauma and, absence of pro-social morals.[593]

In Grobler and Hesselink's discussion on the reasons for a lifetime subscription to gang membership, focus on comfortably enduring correctional centre conditions was the primary reason. Thus, inmates join gangs to seek protection from the harsh correctional centre conditions of overcrowding, poor sanitation and corruption amongst correctional officials. Criminological reasons for joining a gang include loneliness due to family ties being severed or from being part of an unhealthy family structure. It is this need to be loved, accepted and supported that gangs

[590]Steinberg (note 582 above) 3.
[591]Ibid.
[592]L Grobler & A Hesselink 'Criminologists in Corrections: An Assessment and Understanding of Gang Involvement and Related Behaviour' 2 (2015) *Acta Criminologica* 22.
[593]Ibid 22 – 25 and 33.

offer its recruits a so called 'stable family unit'. Every male needs a female counterpart to cook, clean and provide for his sexual needs. One then witnesses the strange occurrence of gender roles being assumed in correctional centres for this need to be a head of a family.[594]

Sasha Gear, amongst others, is the leading author on the analysis of masculinity and sexual violence in male correctional centres. She has contributed an extensive amount of research to this particular field. South African correctional centres at the advent of democracy still face two of the community's paramount taboos namely male rape and homosexuality.[595] It is imperative for the society to grapple with a thorough understanding of the two concepts. Rape in any instance entails the violation of a person's rights and amounts to violence whereas homosexuality is a right to express one's sexual orientation.[596]

It is important to mention that even though the 28s are the only gang that are permitted to have sex, the other number gangs engage in various sexual activities.[597] Gear has highlighted the difficulty of researching male sex in correctional centres as being cumbersome to enter a confidential realm where the participants feared reprisal by their superior counterparts. Ethical dynamics of extreme sensitivity and privacy of sex, male rape and homosexuality arise.[598]

Dominant marriage relationships exist between males in correctional centres. Gendered roles between the two male inmates subsist. The dominant is known as the husband or boss and the meek subservient male is seen as the '*wyfie*' or wife. These roles are determined by the degree of power, materialism, space and relationship with the correctional officials. This is a symbiotic relationship where the man supports and protects the woman who in turn exchanges the favour with sexual activities. The *wyfie*'s every action is monitored and requires permission from the husband.[599]

[594]Grobler & Hesselink (note 592 above) 24.
[595]Ibid.
[596]Gear & Ngubeni (note 588 above) 2 – 3.
[597]Ibid 5.
[598]Ibid 9 – 10.
[599]Ibid 11 – 12.

> The wife does nothing. But if there are some things in our cell, the wife can look after them: washing, those sorts of things. It's a matter of being abused, that person is using you all the time…If he wants tea, you must go and make tea. If he wants his washing to be washed, you must do it. In fact those things that are done by women, you must do them.
>
> If he stays with a person he knows that this person is going to do this and that for me and…that it is my duty, every night, to give him whatever he wants…It's just like being a woman on the outside.[600]

There is no real concept of divorce in these correctional centre marriages, as usually the victim is lured and trapped into the relationship. Upon arrival into a correctional centre, an inmate faces a host of dangers that threaten his well-being and continued stay in a correctional centre. Crimes such as muggings and theft occur where the old inmate strips the new one of all his clothes. Non-gang members are called '*mphatas*' and are usually awaiting trial detainees.[601] Once fear is instilled in the newcomer, threat and physical assaults ensue. Vulnerable new inmates are doped under the guise of friendship into becoming life-long sex slaves. Sex is the exchange currency in correctional centres. However, other extenuating circumstances such as weakness, age, attractiveness, intelligence, criminal status, publicity and degree of education contribute to an inmate's insertion into the correctional centres hierarchal ranks.[602]

Rape is a common occurrence in correctional centres, especially in awaiting trial sections. There are various levels of coerced sexual activities and eventually it is normalised, as '[a]t first…it comes as a shock…you feel that your physical integrity is violated…But as time goes on people learn to accept this…as part of the package in prison'.[603]

Wyfie's move along feminine ranks. Thus, dangerous sexual activities and multiple partners lead to the spread of sexually transmitted diseases. The gangs determine the type of sexual activities. The husband penetrates the wife and if a man is raped, he becomes a woman. Women have no rights and all the fellow inmates treat them as sex objects. Due to the persecution and humiliation that accompanies being a woman, some women embrace the role and openly consent to sex. The culture of rape in correctional centres is perceived as a fashion statement and badge of honor for the man. The ground of justification used for rape is a man's overpowering sex drive to abuse

[600]Gear & Ngubeni (note 588 above) 12 – 13.
[601]Ibid 12 – 13.
[602]Ibid 16 – 30.
[603]Ibid 31.

innocent inmates who are trying to serve time for a crime that they have committed. In order to remove a woman's status and revert to being a man, violence of killing another person is required. It is clear that inmates experience crime amongst criminals as crime within a correctional centre is used as a tool in advancing gang practices. It is one vicious cycle of crime. Thus, the prospects of an inmate leaving a correctional centre crime free are slim.[604]

4.4.2. Consensual Sex – Homosexuality

The other contributory factors that aggravate gangsterism and sexual violence include homosexuality, prostitution and consensual sex. Zungu and Potgieter's research posed some very controversial solutions to reducing the practice of sex in correctional centres. They hypothesise that there should be a deregulation of consensual sex in correctional centres as sex is a human right.[605] More interestingly, they advocate the institution of conjugal visits in correctional centres to maintain the inmate's sexual relationships. Comparative jurisprudence of the USA and Sweden have models in place to allow inmates to participate in conjugal visits. 'It is believed that conjugal visits strengthen family ties, reduces consensual sex, even reduce tension between correctional officers and inmates, make inmates more manageable and allow them to keep better contact with life outside the four walls of a correctional centre'.[606] Certainly, various suggestions to curb the scenario of either consensual sex or rape in correctional centres may be proffered. However, it is arguable that consensual sex and homosexuality in correctional centres can incite more dangerous gang practices and sexual violence where power struggles ensure. No one solution can be the ultimate cure to the problem. Can permitting consensual sex or conjugal visits solve the gang traditions that haunt correctional centre cells forever? If I suggest that male and female inmates be housed in one cell, would this be the solution?

[604]Gear & Ngubeni (note 588 above) 37 – 50.
[605]R Zungu & PJ Potgieter 'The Prevalence of Consensual Sex in South African Male Correctional Centres' (2011) 24(2) *Acta Criminologica* 60.
[606]Ibid 64.

4.5. The Impact of Gang Practice and Sexual Violence in Correctional Centres

4.5.1. Male on Male Rape

The impact of gangs on an inmate's right to freedom is highly curtailed as once an inmate joins a gang, he can never leave.[607] Attempts to undermine the gang leaders or their tenets will lead to a death wish.[608] It is clear from the dialogue in the section above with a *wyfie* that this role is demeaning and infringes upon an inmate's right to freedom of association, freedom from slavery, servitude and forced labour and the right to security.[609]

Thus, one of the harsh realities of an inmate is being subjected to sexual violence, rape due to gang membership and the fear of contracting HIV and AIDS.[610] Zander, an inmate, tells a tale of how he was raped by a fellow male inmate:

> I was frightened and confused. I kept thinking, 'This is not happening. This is a nightmare. I couldn't move, or cry, or scream, or even breath that well. My jaw was all clenched up. He hit me in the stomach, and then jerked off my belt and pulled down my pants. I then realized I was going to be raped- I just thought 'no…no…no' and stared at the wall' He then hit me in the testicles with the hairdryer a few times, then suddenly pushed me over and penetrated me. It hurt so bad, I started gagging. I could smell his sweat on me. I could smell his cologne.[611]

No one deserves to be treated in this way and it is never the victims fault.[612] From the personal perspective of the victim, he often feels embarrassed and fears retaliation of the perpetrator and even correctional officials to report a case of rape. There is a general 'culture of silence'.[613] This eventually drives victims to commit suicide.[614]

South Africa's country report to the Human Rights Council identified sexual violence as a priority concern. It documented that a National Policy on Sexual Assault and Management Guidelines for Sexual Assault Care has been executed in collaboration with the South African community.[615]

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[607]Gear & Ngubeni (note 588 above) 11 – 13.
[608]Ibid.
[609]Section 18,13 and 12 of the Constitution.
[610]S Gear & H Barclay *Let's end it now! Stopping Sexual Violence in Correctional Centres: A Resource for Staff* CSVR, Norwegian Ministry of Foreign Ministry (2011).
[611]Ibid 20.
[612]Ibid 21.
[613]Muntingh & Satardien (note 93 above) 16.
[614]Ibid 21.
[615]South Africa's Country Report to the Human Rights Council's Universal Periodic Review Mechanism (15 April 2008) 12 para 66. Available at <www.ohchr.org>.

Thus, sexual violence in South Africa as well as its correctional centres are an issue of utmost importance.[616]

There is a fine line drawn between sexual violence and consent in correctional centres. The essential element of rape is the lack of consent in perpetuating a sexual act. However, in correctional centres, there are varying degrees of consent and being forced to have sex.[617] Thus, the common law definition of rape is obsolete and one seeks clarity from the Sexual Offences and Related Matters Act[618] and Domestic Violence Act[619] in order to determine the rights of inmates and their recourse.

Prior to the proclamation of the Sexual Offences and Related Matters Amendment Act,[620] the common law definition of rape was confined to 'the intentional unlawful sexual intercourse with a woman without her consent'.[621] This definition of rape did not include the possibility of males being forced into being penetrated by another male. This offence was not defined as rape but rather indecent assault. These avenues have been bolstered in the Sexual Offences and Related Matters Act, where various sexual activities between males are defined under the definition of rape and other sexual offences as criminal offences.[622]

[616]Ibid.
[617]Gear & Ngubeni (note 588 above) 1 – 5.
[618]Sexual Offences and Related Matters Amendment Act 32 of 2007.
[619]Domestic Violence Act 116 of 1998.
[620]Sexual Offences and Related Matters Amendment Act 32 of 2007.
[621]JM Burchell *Principles of Criminal Law* 4th ed (2013) 699.
[622]Zungu & Potgieter (note 605 above) 61. Sexual Offences and Related Matters Amendment Act 32 of 2007 repeals 'the common law offence of rape and replacing it with a new expanded statutory offence of rape, applicable to all forms of sexual penetration without consent, irrespective of gender; repealing the common law offence of indecent assault and replacing it with a new statutory offence of sexual assault, applicable to all forms of sexual violation without consent…'

For purposes of interpretation of the term 'sexual violence' in the context of this chapter, it includes rape[623] and any *sexual* offence[624] as defined by the Sexual Offences and Other Related Matters amendment Act and any form of domestic *violence* as defined under the Domestic Violence Act.[625]

It is quite an anomaly that rape is not documented in correctional centres. No trend can be pin pointed relating to the rape and sexual offences in correctional centres. The irony is that correctional centres house rapists.[626] These rapists can continue their career in correctional centres or even reverse roles and become victims.[627] So DCS does not guard against the crime against criminals for the very reason that they are criminals themselves.[628]

4.5.2. Reporting Rape exacerbates the Impact on Inmates' rights

One of the major challenges that inmates face is the fear of reporting rape. Statistics that emerge from the United States of America for example, reveal that only three out of one thousand inmates report sexual offences. There is a culture of silence of males reporting rape to correctional officials.[629] Here are some of the many reasons why South African male inmates fail to report rape: the generalisation that rape is normal in correctional centres, the victim fears being terrorised, trivialisation that justice can be served, confusion as to whether male rape is a crime, male ego of not being a victim of rape and fear of being raped again.[630] The life of rape being classified as a crime was revived in the Jali Commission Report when the secret of rape in correctional centres

[623]S 3 of the Sexual Offences and Related Matters Amendment Act defines rape as 'Any person ('A') who unlawfully and intentionally commits an act of sexual penetration with a complainant ('B'), without the consent of B, is guilty of the offence of rape'.
[624]'Sexual offence' means any offence in terms of Chapters 2, 3 and 4 and sections55 and 71 (1), (2) and (6) of the Sexual Offences and Related Matters Amendment Act 32 of 2007. [NB: The definition of 'sexual offence' has been substituted by s. 48 of the Prevention and Combating of Trafficking in Persons Act 7 of 2013, a provision which will be put into operation on a date to be proclaimed. See PENDLEX.]
[625]S 1 of the Domestic Violence Act 116 of 1998 which defines domestic violence as '(a) physical abuse;(b) sexual abuse;(c) emotional, verbal and psychological abuse;(d) economic abuse; (c) intimidation;(f) harassment:(g) stalking;(h) damage to property:(i) entry into the complainant's residence without consent, where the parties do not share the same residence; or (j) any other controlling or abusive behaviour towards a complainant, where such conduct harms, or may cause imminent harm to, the safety. Health or wellbeing of the complainant'.
[626]WFM Luyt 'Preventing and Managing Sex Crimes Inside Correctional Centres' 26(2) (2013) *Acta Criminologica* 33.
[627]Ibid.
[628]Ibid.
[629]Ibid 30.
[630]Gear & Barclay (note 610 above) 63.

was revealed.[631] Issues of State accountability and secrecy present themselves at the forefront of the Jali Commission Report.[632] The Jali Commission Report was a product of the president's appointment of a Commission of Inquiry to investigate the incidence of corruption, violence, maladministration and intimidation within the DCS.[633] The Jali Commission found correctional officials as lucrative businessmen in the arena of 'smuggling' of food items, arms, intoxicants such as drugs and cigarettes.[634] Correctional officials do not only trade in goods but services as well, where they solicit sex amongst inmates and facilitate prostitution.[635] Gear and Ngubeni's study document the words of an inmate:

> There are some [prisoners who] …live a nice life, they have money…They tell the warders to do them favours, saying… 'I like that boy' and they give the warders a bribe, maybe R10.00 to buy Coke. The warders will make sure that they lead you to that prisoner's hands so that he can use you for sex.[636]

4.5.3. Sexual Violence by DCS Officials

Two very noteworthy Eastern Cape High Court cases illustrating the abuse of inmates by correctional officials are *Dayimani v The Minister of Correctional Services*[637] and *Fondling v Minister of Correctional Services.*[638] In the first case, correctional centre guards had assaulted the plaintiff (a remand detainee). He sustained severe injuries resulting in his paralysis. Kemp J found in favour of the plaintiff awarding him the claim for damages that he prayed for.[639] The plaintiff in the latter case was brutally assaulted by two drunken correctional officials. They forced him to remove his pants and underwear and raped him with a pool cue. Thereafter, they tried to bribe him with R10. The judgment in *Fondling* is in direct contrast to that in *Dayimani,* as Jansen J held that

[631]Justice Jali TSB Commission of Inquiry into the alleged incidents of corruptions, maladministration, violence or intimidation into The Department of Correctional Services appointed by the order of the President of the Republic of South Africa in terms of Proclamation No.135 of 2001, as amended. Available at <http://www.info.gov.za/otherdocs/2006/jali/>
[632]Muntingh (note 19 above) 18.
[633]A van der Berg *Summary and Comment on the Final Report of the Judicial Commission of Inquiry into the Allegations of Corruption, Maladministration and Violence in the Department of Correctional Services -"The Jali Commission"* CSPRI Research Report No 13 (2007) 5.
[634]Ibid
[635]Ibid 15 – 16.
[636]Gear & Ngubeni (note 588 above) 67.
[637]*Dayimani v Minister of Correctional Services* (2009) ZAECGHC 42 (17 July 2009) (428/08).
[638]*Fondling v Minister of Correctional Services* (2009) ZAECPEHC 29 (25 June 2009) (584/08).
[639]*Dayimani v Minister of Correctional Services* (note 637 above) para 3 and 31.

the plaintiff's version of the story was inconsistent to that of his correctional official counterparts; and dismissed the case with costs.[640]

A pertinent case that raises tremendous concern is that of *Bradley McCallum.*[641] The facts of the case are deplorable. McCallum a South African citizen went so far as to seek relief at the United Nations Human Rights Committee (the supervisory body of the ICCPR) via its communication procedure,[642] for atrocities that were committed by the South African correctional centre authorities at St. Albans Maximum Correctional Facility in Port Elizabeth.[643] The facts of the case evidence that McCallum was beaten with batons and shock shields while he and approximately 60 – 70 other inmates were forced to lay naked on a watered down corridor. He sustained severe injuries,[644] was raped with a baton and verbally abused. He formed a link to a human chain that was interconnected by inmates being forced to place their noses in the anus of the inmate in front of him. McCallum and all the inmates were covered in urine, feces and blood. The risk of contracting HIV and AIDS was inevitable. This incident was further heightened when McCallum was denied contact with his family and access to HIV and AIDS testing.[645] The impact of the violence on McCallum's right to healthcare is discussed in more detail in chapter five below.

The Committee addressed McCallum's facts, in the absence of any South African representative from DCS and held that it clearly violated art 7 read with art 2 paragraph 3 of the ICCPR. It also furnished a 180 day period for South Africa to address the Committees views.[646] Carte Blanche[647] featured a story on the McCallum case and concluded an interview with Zacharia Modise (Chief Deputy Commissioner of DCS).[648] The interview revealed his utter denial of the facts of the case stating that only necessary force was used.[649] This case is a turning point in the sphere of

[640]*Fondling v Minister of Correctional Services* (note 638 above).
[641]*Bradley McCallum v South Africa* (McCallum represented by counsel, Egon Aristidie Oswald) 25 October 2010 CCPR/C/100/D/1818/200. (Hereinafter referred to as *Bradley McCallum*).
[642]South Africa has ratified the International Covenant on Civil and Political Rights, which allows for complaints to the United Nations Human Rights Committee. Amnesty International Report (note 127 above) 352-353.
[643]*Bradley McCallum* (note 641 above) 3.1.
[644]These included dislocating his jaw, acute dental injuries that led to the removal of his teeth, contusions and lacerations to his arm and head.
[645]*Bradley McCallum* (note 641 above) 6.2.
[646]Ibid 6.7 and 9.
[647]Carte Blanche is a South African investigative journalism television programme.
[648]Bongani Bingwa 'Prison Assault' Carte Blanche 1 April 2012 Available at <http://beta.mnet.co.za/carteblanche/Article.aspx?Id=4517&ShowId=1> (Hereinafter referred to as Bongani Bingwa 'Prison Assault')
[649]Ibid.

correctional centre conditions' impact on inmates' rights.[650] The aforementioned events that transpired on 15 July 2005 will be etched in the minds of every victim for life. Bafu Duru, who was one of the victims of torture amongst McCallum, fortified the veracity of this gruesome event in a talk show entitled: 'It Could Be You'.[651] He described the impact of the torture as follows: 'I was in shock when all this happened, I couldn't believe it, especially that the same people who were supposed to be showing me the way were destroying me.' He lamented that: 'It was the worst experience of my life.'[652]

Egon Oswald, the Attorney in the McCallum case was voted Human Rights Attorney of 2011 for being the first South African lawyer to win a human rights violations and torture matter against the State. He also emphasised that maladministration contributes to the violation of inmates' rights. Furthermore, litigation against the State is vital in trying to protect taxpayer's money from being squandered into briefing expensive counsel to hide behind the States own laws. Exposing the truth and protecting human rights is paramount in a democratic country.[653]

South Africa needs to bear in mind that just as local cases go undetected, its international obligations cannot be surpassed as easily. The representatives of the South African DCS cannot hide behind a veil of embarrassment and denial by robbing inmates of their rights.[654]

[650]Bongani Bingwa 'Prison Assault' (note 648 above).
[651]Wits Justice Project *"It Could Be* You" Talk Show Booklet (Conference held on 17 May 2012) Old Women's Prison, Constitutional Hill 7- 8 (Booklet obtained directly from Project Coordinator Nooshin Erfani-Ghadimi).
[652]Ibid.
[653]Ibid.
[654]Bongani Bingwa 'Prison Assault' (note 648 above).

4.6. Current Statistics and Trends extrapolated from DCS and JICS Reports regarding Gangsterism and Sexual Violence

4.6.1. DCS Reports

In the statement of contingent liabilities, I have extrapolated all the data from the Annual DCS reports from 2006 – 2015[655] in the table below to demonstrate the amount of damages that the State was liable for under the subheading 'Rape'. The statistics for inmate rape are absent in the DCS reports. These would include rape by inmate on inmate, correctional official on inmate and inmate on correctional official in correctional centres. These statistics are vague as to who were the victims of rape, who were the perpetrators of rape and why these amounts were payable for 'Rape' by the State. It can be assumed, that this amount is indicative of only the few cases of rape that were reported. Due to the number of unreported rape cases, it cannot be a true reflection of the current amount due and payable by the State for rape cases let alone the extent of the problem of rape in correctional centres. However, these are the only available statistics. The lack of information on the rape statistics is thus problematic.

The Auditor General in the 2014/2015 DCS report raised concerns about the accuracy and validity of information provided by DCS in its annual report especially in the achievement of the incarceration program and that effective measures were not exhausted to prevent irregular expenses. More importantly, the Auditor General made the following finding regarding the item 'Contingent Liabilities':

> I was unable to obtain sufficient appropriate audit evidence for claims against the department because it did not have adequate systems and processes to record and maintain a register for claims against the department. I could not confirm claims against the department by alternative means. Consequently, I was unable to determine whether any adjustment to claims against the department stated at R791.3 million (2013-14: R801.2 million) in the financial statements were necessary.[656]

Therefore, the reliability and accuracy of the information in the DCS reports are questionable and are a matter of concern as expressed by the Auditor General.

[655]Annual Report of the DCS from 2006 – 2015.
[656]Annual Report of the DCS (2014/2015) 105.

Table 8: Amount Payable by the State for 'Rape' from 2006 – 2015

ANNUAL DCS REPORT PERIOD	AMOUNT PAYABLE BY THE STATE FOR RAPE
2006 - 2007	Damages for rape was not enlisted in the report.[657]
2007 – 2008	R 5 500 000[658]
2008 – 2009	R 1 002 000[659]
2009 – 2010	R 4 089 000[660]
2010 – 2011	R 4 459 000[661]
2011 – 2012	R 4 459 000[662]
2012 – 2013	R 3 459 000[663]
2013 – 2014	R 5 259 000[664]
2014 - 2015	R 6 259 000[665]

Upon closer inspection of the data in Table 8, it is clear that rape in the 2006 – 2007 period was still a new concept to DCS as the Sexual Offences and other related Matters Amendment Act was yet to be promulgated. However, a steep escalation in the 2007 – 2008 period shows that the State was liable for 5.5 million rands. A sharp decline in this number was witnessed in 2008 – 2009 period followed by three years of approximately over 4 million, due by the State. The 2013 – 2014 period escalated to an amount that was due initially in 2007 – 2008. However, the current amount due by the State is a grand total of R 6 259 000. This is exorbitant exclusive of the unreported rape and somehow is a compounded amount since 2007 – 2008. The amounts due by the State for rape is not seen a matter of priority as the numbers remain stagnant and outstanding.

The aforementioned discussion evidences the lack of rape statistics by DCS in its Annual reports. The table above shows large amounts due by the State for 'Rape'. No explanation of the amounts

[657]Annual Report of the DCS (2006/2007) 132.
[658]Annual Report of the DCS (2007/2008) 144.
[659]Annual Report of the DCS (2008/2009) 148.
[660]Annual Report of the DCS (2009/2010) 190.
[661]Annual Report of the DCS (2010/2011) 193.
[662]Annual Report of the DCS (2011/2012) 168.
[663]Annual Report of the DCS (2012/2013) 172.
[664]Annual Report of the DCS (2013/2014) 146.
[665]Annual Report of the DCS (2014/ 2015) 176.

payable for the 'contingent liability' entitled 'Rape' was accounted for in DCS reports for almost a decade.

The 2014/2015 Annual DCS report is silent on the issues of gangsterism and sexual violence in South Africa's correctional centres.[666] However, it was recorded that 4.9% (7 850/159 563) of the correctional centre population was assaulted. The DCS admitted that they could not meet their target of reducing the assaults in correctional centres due to gangsterism and overcrowding.[667]

The Annual 2015/2016 DCS report mentions that DCS is in the process of drafting a 'Gang Management Strategy', framing gansterism as a national security risk to the community.[668] Different correctional centres are already using a gang management checklist aligned to this strategy. The inter-department gang management strategy with the National Intelligence Coordinating Committee is yet to be executed.[669]

DCS has failed in executing its mandate and obligation to keep inmates safe. DCS'organogram is flawed as it has undergone several restructuring due to poor leadership, the absence of staff and politics.[670] The Correctional Services Act does not allude to the notion of sexual violence in the act itself and only provides a derisory section on sexual assaults for the intended audience being the staff.[671]

DCS is obliged to ensure that inmates rights' are protected and enforced in terms of the Sexual Offences and Related Matters Amendment Act 32 of 2007 which provides that males can be raped by other males.[672] This obligation by DCS is strengthened by the National Policy Framework for the Management of Sexual Offences (NPF).[673] The NPF is an important stride for DCS to acknowledge that rape is problematic in correctional centres and to adopt a zero tolerance approach

[666]Annual Report of the DCS (2014/ 2015) 10.
[667]Ibid 48.
[668]Annual Report of the DCS (2015/ 2016) 10.
[669]Ibid 53.
[670]S Gear 'Imprisoning Men in Violence, Masculinity and Sexual Abuse: A View from South African Prisons' September (2010) No 33 *South African Crime Quarterly* 27 – 28.
[671]Ibid.
[672]Section 3 of the Sexual Offences and Related Matters Amendment Act 32 of 2007.
[673]Department of Justice *National Policy Framework: Management of Sexual Offences Matters* First Edition (March 2011) Available at: <www.justice.gov.za%2Fvg%sxo%2F2012-draftNPF.pdf>

to sexual violence in correctional centres.[674] Thus, the NPF urges DCS to implement a strategy for the management of sexual offences within correctional centres, implement rehabilitation programs, strengthen parole boards and report annually in relation to plans implemented.[675] The NPF places an obligation on DCS to fully eradicate sexual offences by implementing primary, secondary and tertiary preventative methods.[676] 'It also calls on training of all staff to prevent, detect, and respond to cases of sexual abuse, and to improve staffing and surveillance to protect inmates at all times'.[677]

The extent of the impact of South Africa's correctional centre conditions on inmates' rights is clearly evident from the observation made above from the DCS' strategic plan. Upon scrutinising the Strategic Plan as projected for 2019 – 2020, I can positively state that DCS is at present not meeting their Strategic Outcomes Oriented Goal 2 (SOOG) which states: 'All sentenced offenders are being incarcerated in safe, secure and humane facilities, their health care needs are provided for and there are effective rehabilitation programmes…'.[678]

Alarmingly, DCS attests to the fact that only 37% (91 of the 245) correctional centres were inspected for the human treatment of inmates. As at 2016, approximately 154 correctional centres which is more than half of South Africa's correctional centres remain uninspected. It is presumable that these correctional centre conditions are not in line with the SOOG 2 for safe, secure and humane facilities. Therefore, this lacuna allows DCS another five years just to inspect 63% of South Africa's correctional centres and improve humane treatment of inmates.[679]

In a period of five years, DCS plans to 'ensure that offenders are held in secure, safe and humane conditions' by decreasing 'assaults' from 4.67% (7370/157 969) to 3.4% (5468/160 831).[680] DCS is aware of the 7 370 'assaults' which is approximately 5% of South Africa's inmates being subjected to crime. It is inconceivable to plan to reduce assaults in correctional centres by 1.2% over a five year period. In lieu of all these strategic plans for DCS, it must be highlighted that for

[674]Sonke Gender Justice 'Systemic Reforms to Address Sexual Abuse of Inmates Successfully Adopted' 23 September 2013. Available at: http://www.genderjustice.org.za/article/sytemic-reforms-address-sexual-abuse-inmates-successfully-adopted/.
[675]National Policy Framework (note 673 above) 15.
[676]Ibid 26.
[677]Sonke Gender Justice (note 674 above).
[678]DCS Strategic Plan for 2015/2016 – 2019 – 2020 (note 507 above) 26.
[679]Ibid 32.
[680]Ibid 38.

the 2015/2016 and 2017/2018 financial period, the incarceration program is allocated an amount of R 36.9 billion rands to discharge their duty to manage correctional centres that are secure, safe and humane.[681]

Going back to Luyt's observations, these observations stand relevant today. 'Management of rape as such does not feature in any prominent report of the Department of Correctional Services and detection, prevention, and response strategies on the crime (inmate rape and sexual assault) are absent.'[682] Therefore, the reliance on DCS from tracing rape in correctional centres is problematic.

4.6.2. JICS Reports

JICS in their quarterly report noted that there were 66 assault complaints received internally from inmates, their family and ICCVs. It appears that only 2 of the 66 complaints received in the three-month period related to sexual offences.[683] The ICCV reported that a 19-year-old remand detainee was raped on 17 November 2015 and again on 19 November 2015 by four fellow inmates. It is important to stress that the ICCV played a vital role in so far as the reporting of the rape was concerned. However, this rape matter was diarised. No SAPS case number or investigation was followed through, leaving the status of the matter as pending.[684] The other sexual incidence was reported by an inmate's mother. No intervention was made, the matter was simply captured.[685]

Unnatural deaths require DCS to thoroughly investigate the matter and submit a post mortem report. Suicide is common in correctional centres due to the high incidence of gangsterism and sexual violence. Post mortem reports are the only reliable evidence to establish the exact cause of death. Suicides may be a result of a victim taking his own life due to being raped or due to the criminal gang traditions of 'spilling blood'. Gang murders can easily be staged as suicides. [686]

The ICCV reported an incident where one inmate stabbed another. However, the post mortem report is still absent. A murder that took place on 15 November 2015 at St Albans Prison is another

[681]DCS Strategic Plan for 2015/2016 – 2019 – 2020 (note 507 above) 51.
[682]Luyt (note 626 above) 49.
[683]JICS Quarterly Report for October to December 2015. Available at <http://judicialinsp.dcs.gov.za/projects/docs/2015/October%20-%20December%202015%20Quarterly%20Report.pdf> 31.
[684]Ibid 50 – 51 Item 32.
[685]Ibid 52 item 38.
[686]Ibid 62. WJP Conference (note 24 above) 15.

perfect example of violence. An inmate was beaten to death by a fellow inmate as a result of the suspected theft of personal items. The post mortem report confirmed the murder and cause of death as 'blunt force trauma to the body'.[687]

JICS in their 2014/2015 annual report confirmed that there were 629 deaths, which comprised of 46 unnatural deaths.[688] These unnatural deaths consisted of 17 suicides, one homicide where a DCS official killed an inmate, 10 inmate on inmate homicides, 2 shootings, 1 drowning and 15 unknown. The suicide rate in Gauteng correctional centres are the highest with hanging being the most common mode. Due to gang practices, 10 lives were taken in 2014/2015 of the previously stated deaths. These inmates were stabbed with sharp objects. One inmate even died from being burnt by boiling hot water due to a gang related incident.[689]

Many incidents of violence surface from the Judicial Inspectorates Reports. One prominent gang related incident occurred in 2013 in the St Albans correctional centre. A gang war instigated by the 28s ensured. Inmates used handcrafted weapons killing three and injuring 62 inmates.[690] JICS declared that DCS is guilty of breaching section 4(2) (a) of the Correctional Services Act and the correlative Regulations in that the DCS infringed upon inmates right to safety in this instance and 5 others.[691] Evidence leans towards the fact that DCS is not implementing anti-gang strategies to prevent violence and deaths.[692] JICS recommends that all gang related incidents should be governed by section 9 – 11 of the Prevention of Organised Crime Act 21 of 1998. DCS must work with the Justice Cluster in the identification and conviction of gang leaders.[693]

The Judicial Inspectorate highlighted that closed circuit television (CCTV) was an effective mechanism in correctional centres. However, South Africa's CCTV camera equipment has been damaged beyond repair. DCS has not yet replaced or upgraded these facilities.[694] Considering current advancement in technology, I think that it is disgraceful that correctional centres have not devised a technological blueprint to monitor correctional centre conditions. This system will

[687]Ibid 66 – 67.
[688]Annual Report of the JICS (2014/ 2015) 85.
[689]Ibid 86 – 87.
[690]Annual Report of the JICS (2014/ 2015) 88.
[691]Ibid, see pages 88 – 91 for the five other reported instances.
[692]Annual Report of the JICS (2014/ 2015) 88 – 91.
[693]Annual Report of the JICS (2015/ 2016) 61.
[694]Ibid 41.

protect innocent inmates from sexual harassment and assist the DCS in identifying the victims and perpetrators. Rape is a criminal offence and inmate victims are entitled to justice. Thus, the video footage that documents rape will clearly serve as admissible evidence in a court of law. I am convinced that CCTV monitoring by an external stakeholder or independent constitutional institution can effectively manage gangsterism and sexual violence in correctional centres. It is debatable that a balance must be struck between an inmate's right to safety and their right to privacy in terms of the limitation clause.[695]

4.7. States' Obligations in Addressing the Challenge of Gangsterism and Sexual Violence

> The safety of inmates compels the Department to effectively deal with the issue of gangs in correctional centres. Gangs have been a feature of the South African correctional system over the past century. Along with the presence of gangs is a level of correctional centre violence that violates the safety of other inmates. It manifests in many ways, such as gang supported fights, assault and murder, forced sexual activity or rape, intimidation and coerced favours, and complicity of or the turning of a blind eye by correctional officials in relation to these activities.[696]

The State has a constitutional duty and an international obligation[697] to ensure that inmates are treated in a humane manner by affording paramount respect to their right to dignity.[698] Victim's exposure to rape and sexual violence in a correctional centre context can be classified under the CAT as a definitive form of torture that is strictly prohibited. Can the State be responsible for the actions of non – state members (other inmates) when they perpetrate the crimes of rape and sodomy? [699]

Furthermore, if the State has a duty of care and if this question is answered in the affirmative, can the State be liable for the willful or gross negligence of exposing the inmates to such an environment that facilitates contracting communicable diseases such as HIV and AIDS? Does the State have a legal duty to stop, prevent or mitigate against allowing sexual violence in correctional centres? South African law sentences a perpetrator who rapes another while knowing that he is

[695]The Constitution s 36.
[696]The White Paper on Corrections in South Africa (9 February 2005) 155. Available at <http://www.info.gov.za/view/DownloadFileAction?id=68870>155.
[697]In terms of the Article 10 of the ICCPR (note 127 above).
[698]Muntingh & Saterdien (note 93 above) 5.
[699]Ibid 1.

HIV positive, to a life sentence.[700] Can the State bare delictual liability or criminal accomplice liability? To answer these questions, consultation with case law is essential.[701] There is a clear violation of rights and my dissertation explores these intricate debates and oversights and offer some guidance in preventing, combating and mitigating such rights violations in chapter five below. I shall now draw upon my observations in relation to torture, cruel, inhuman and degrading treatment or punishment.

> The sexual assault of prisoners, whether perpetrated by correctional officials or by other inmates, amounts to torture under international law.[702]

The United Nations Special Rapporteur on Torture stated: 'Rape and other forms of sexual assault in detention are a particularly despicable violation of the inherent dignity and right to physical integrity of every human being; and accordingly constitute an act of torture'.[703]

CAT and ICCPR prohibit torture. Article 1 of CAT provides a definition for torture as:

> Any act which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed, or intimidating him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.[704]

Upon closer inspection of the definition of torture, sexual violence in correctional centres meets each of these elements. Rape, assault, sexual violence by inmate on inmate or correctional official on inmate is an act of torture. Inmates suffer the aftermath of a violent rape by another inmate, physically beaten, mentally anguished and for many inmates, they contract communicable diseases such as HIV or STI's. Acts of gangsterism use other inmates or even correctional officials (third persons) to orchestrate inmate on inmate rape and target vulnerable and weak inmates. The State

[700]P Marius 'Disentangling Illness, Crime and Morality: Towards a Rights – based Approach to HIV Prevention in Africa' (2011) 11 Issue 1 *AHRLJ* 57, 63.
[701]*Carmichele v Minister of Safety and Security* 2001(4) SA 938 (CC).
[702]Just Detention International 'Prisoner Rape is Torture Under International Law: Fact Sheet' (February 2009). Available at <https://justdetention.org/wp-content/uploads/2015/10/FS-Prisoner-Rape-is-Torture-Under-International-Law.pdf>
[703]Ibid 1.
[704]Article 1 of CAT (note 131 above).

has a duty to protect inmates' rights. Thus, the omission to act by taking steps to stop and prevent inmate rape equates to 'state acquiescence' to this act of torture.[705]

In light of the aforementioned precedent, it is crucial for South Africa to criminalise torture within its correctional centres to avoid overstepping the international threshold. The Combating of Torture Bill was scheduled to be tabled in Parliament in September 2011[706] The President assented to the Prevention of Combating and Torture of Persons Act (The Combating of Torture Act)[707] on 24 July 2013. The purpose of the Act is to give effect to South Africa's obligations in terms of the CAT.[708] The objects of the Combating of Torture Act are to recognise equal rights for everyone based on dignity, peace and respect for human rights and that no one must be tortured.[709] A clear definition of torture is advocated in section 3 of the Act namely:

> For the purposes of this Act "torture" means any act by which sever pain or suffering, whether physical or mental, is intentionally inflicted on a person –
> (a) For such purposes as to –
> (i) Obtain information or a confession from him or her or any other person;
> (ii) Punish him or her for an act, he or she or any other person has committed, is suspected of having committed or is planning to commit; or
> (iii) Intimidate or coerce him or her or any other person to do or to refrain from doing, anything; or
> (b) For any reason based on discrimination of any kind,
> when such pain or suffering is inflicted by or at the instigation of, or with the consent or acquiescence of a public official or other person acting in an official capacity, but does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.[710]

It must be noted that this definition of torture is similar to the definition advocated in Article 1 of CAT as enlisted in chapter two of this dissertation.[711] The punishment for committing torture amongst others is incarceration inclusive of life incarceration.[712] Using a title of a government official cannot suffice as a ground of justification or mitigation.[713]

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[705]Just Detention International (note 702 above) 1.
[706]Muntingh L & Ballard C *Submission by the Civil Society Prison Reform Initiative on the Prevention and Eradication of Torture in South African Prisons* Available at <http://cspri.org.za/news/cspri-news/submission-on-torture-in-prisons-to-portfolio-committee-on-correctional-services> Department of Justice and Constitutional Development *Combating of Torture Bill in the Pipeline* 5 June 2012 Available at <http://www.sabinetlaw.co.za/defence-and-security/articles/combating-torture-bill-pepeline>
[707]The Combating of Torture Act 13 of 2013.
[708]CAT (note 131 above).
[709]The Combating of Torture Act s 2(1) (a) (i – iii).
[710]The Combating of Torture Act s 3.
[711]Article 1 of CAT (note 131 above).
[712]The Combating of Torture Act s 4(1) and (2).
[713]The Combating of Torture Act s 4 (3).

DCS has provided the following examples of torture which meets all the elements of the definition of torture in the Combating of Torture Act as lockups, denial of services, correctional officials failure to act when acts of torture are witnessed or reported by an inmate, subjecting an inmate to be placed in an environment that compromises their safety, imposing punitive measures on inmates without following procedures and physical restraint while locked up.[714]

Langa has investigated the incidence of torture in correctional centres and has observed that approximately 200 inmates have died from 2007 to 2011 as a result of unnatural causes, suicide, and assault by fellow inmates or correctional officials.[715] JICS Annual reports documents that the most common category of complaints (approximately 6 000) is assault by correctional officials on inmates.[716] Langa argues that JICS must properly report the incidence of torture in correctional centres.[717] Langa also observed that the JICS reports did not document acts of torture prior to the enactment of the Torture Act.[718]

Presently, there is no accurate statistics tracing the occurrence of torture in South Africa's correctional centres. The JICS Annual reports provide a cursory list of complaints, categorising incidents into inmate on inmate assault, correctional official on inmate assault or common assault. No detailed facts of the cases appear to establish if an incident met the criteria of torture. Langa has also documented the uncertainty in the number of correctional officials that were prosecuted.[719]

The 2015/2016 Annual JICS report indicates that JICS received a total of 60 767 complaints of which 625 (inmate on inmate assault), 811 (official on inmate), 63 (assault – sexual), 15 (torture) and 11 289 (other).[720] Of these 811 official on inmate complaints, only 218 went to the complaints unit under the auspices of being unresolved.[721] No supporting information accompany these statistics to determine the nature of the assaults or torture incidents.

[714]DCS *Corrections@Work* Winter (2016) 13. Available at: <https:www.dcs.gov.za/Publications/CorrectionsAtWork.aspx>
[715]Langa M 'Analysis of Existing Data on Torture in South Africa with specific focus on annual reports published by IPID and JICS' CSVR 7 Available at .<http://www.csvr.org.za/images/docs/Other/analysis_of_existing_data_on_torture_in_south_africa.pdf>
[716]Ibid.
[717]Ibid.
[718]Ibid 9.
[719]Ibid 24.
[720]Annual Report of the JICS (2015/ 2016) 82.
[721]Ibid 84.

It is noteworthy to analyse the finding in the *McCallum* case by the Human Rights Committee that reminds South Africa of their minimum obligations. The Human Rights Committee held that South Africa failed to respond to McCallum's allegations and as such breached article 4(2) of the Optional Protocol to the ICCPR that requires South Africa to cooperate in investigating claims brought against them and furnish the Committee with all information within their knowledge.[722] Furthermore, there was a duty placed on the State to internally investigate the allegations of misconduct by the correctional officers and their dismal failure to conduct such minimal protocols resulted in South infringing upon Article 7 of the ICCPR.[723] The HRC recalled its General Comment passed in 1992 prohibiting incommunicado detention. McCallum was locked down for a period of a month with no access to healthcare and thus the Committee held that South Africa was in further contravention of Article 7.[724] The deprivation of McCallum of his right to be tested for HIV after requesting on several occasions by the State was held as a further contravention of Article 7. South Africa received complaints via correctional services, SAPS, the office of the Judicial Inspectorate and the courts and their refusal to investigate the matter and bring the perpetrators to task, was held by the HRC as a further violation of Article 7 read in conjunction with Article 2, paragraph 3 of the ICCPR.[725]

Muntingh levels some criticism at the Combating of Torture Act in its reading against the Robben Island Guidelines. A number of issues such as investigation of alleged torture, reporting to the Committee against Torture, reviewing of policies, and remedies for victims could have been canvased in the Act.[726] I would like to argue that despite the various criticisms that existing authors level at the Combating of Torture Act, my main criticism relates to whether South Africa adheres to any of its domestic legislation. From the *McCallum* case, it is clear that South Africa has breached its international, regional and domestic obligations. Now to add to this new Act to the list of other Acts lying dormant and piling dust will not make a difference unless the contents of the Act are adhered to and brought to life in the context of South Africa's correctional centres.

[722]*Bradley McCallum* (note 641 above) 7, para 4.
[723]Ibid 9 para 6.4.
[724]Ibid para 6.5.
[725]Ibid 9 – 10 para 6.7.
[726]L Muntingh 'Guidelines and principles on imprisonment and the prevention of torture under the African Charter on Human and Peoples' Rights – how relevant are they for South Africa?' (2013) 77 *Law, Democracy and Development* 369.

Luyt offers some practical recommendations in so far as trying to address the impact that gangs and sexual violence have on inmates' rights. He suggests the following as paraphrased:

1. implementation of new legislation (as there are scarce cases that create precedent in the field of male inmate rape);
2. implementation of policies in line with the Sexual Offence and Related Matters Act 2007;
3. the crime of rape must be reported by the inmate to the South African Police Service for investigation;
4. enforcement of policies regarding crime scene investigation and evidence preservation;
5. staff to be motivated to drive the policy goals;
6. transformation in correctional centre culture with a zero tolerance attitude to rape;
7. rape education and
8. research into rape.[727]

South Africa is still in its infancy levels in confronting sexual violence. It is disquieting to read and analyse DCS reports and strategic plans from the advent of our constitutional democracy to this present day to discover that every report alludes annually to future attempts to facing the reality of realistically eradicating gangsterism and sexual violence in correctional centres so as to not infringe upon inmates' rights. However, no one solution could be posed to transform the mindset of the State who ultimately bears the responsibility for ensuring the safety and security of its inmates.

DCS is yet to develop another initiative in identifying the synergy and effect of the impact of gangsterism whose practices are a direct cause of the transmission of HIV. It is said that this will be implemented under the auspices of the Correctional Matters Amendment Act 5 of 2011, where remand detainees are screened as to their susceptibility to sexual violence upon admission. Policies in terms of the Draft Framework to Address Sexual Abuse of Inmates project to train staff classify inmates and ensure safety of inmates.

[727]Luyt (note 626 above) 56 – 58.

The White Paper for Remand Detention advises that there should be an ongoing security mechanism to protect remand detainees rights to safety. These 'safety plans' are alleged to include gang management and sexual violence strategies.[728]

The gang culture is a deep-rooted problem and even if the State has to deregulate consensual sex, allow for conjugal visits or even host male and female inmates under one roof, the root problem of the violence and protecting inmates' rights under the auspices of gangsterism cannot be entirely solved. The reality of an inmate contracting HIV and AIDS from just one sexual activity sentences him to a lifetime of disease. This reality is discussed in the next chapter.

4.8. Conclusion

This chapter has illustrated that gangsterism and sexual violence infringes on inmates' rights. The extent of the impact of such human rights abuses went so far as the United Nations Human Rights Committee who ruled that conduct by DCS Officials amounted to cruel, inhuman and degrading treatment. South Africa also promulgating the Combating of Torture Act to address torture. DCS and JICS reports evidence that incidents of rape, sexual violence and torture are not properly reported and documented. The findings of my investigation prove that South Africa is not complying with its international, regional and domestic obligations. In fact, DCS is privy to exacerbating gangsterism and sexual violence by the vicarious criminal behavior of their staff. This chapter has established an even more heightened impact of South Africa's correctional centre conditions on inmates' rights.

The incidence of gangs and sexual violence leads to the spread of communicable diseases, which in turn leaves an inmate at the mercy of State healthcare facilities. This chapter has set the foundation for the next chapter that deals with access to healthcare facilities.

[728]White Paper on Remand Detention (note 429 above) 13 – 14.

CHAPTER 5: THE IMPACT OF LIMITED OR NO ACCESS TO HEALTHCARE FACILITIES ON INMATES' RIGHTS

5.1. Introduction

> 'Access to health care' and the provision of adequate medical treatment collide when dealing with persons in the unique positions that prisoners are in. Detainees are unable to obtain any treatment without it being accessible, and in most cases by virtue of their incarceration the detainee is unable to access medical treatment, unless provision is made for it by the state. It may be argued that the provision of 'adequate treatment' is significantly narrower than the notion of 'health services' which includes the underlying determinants of health, such as sanitation, adequate hygiene and health education. Yet, in the context of a prison the notion of adequate treatment must not be too narrowly construed. For an immuno-compromised prisoner 'adequate treatment' will include a well-balanced and nutritious diet, blankets for warmth and to be kept separate from individuals with communicable diseases.[729]

The aforementioned quote succinctly encapsulates an inmate's plight whilst being dependent on the State to ensure that they access adequate healthcare facilities. A doctor or hospital may not refuse to treat a person under the conditions of an emergency. [730] The right to health may be limited in terms of section 36 of the Constitution; however, this right should not be unduly curtailed upon when the entire country's rights are concerned. [731] Assessing the availability of medical practitioners in the entire South African population exhibits the doctor to population ratio as roughly 0.77 per 1 000.[732] This statistic is inclusive of the correctional centre population and reveals that access to healthcare in South Africa is a major concern.

In this chapter, I pick up from the last chapter dealing with gangsterism and sexual violence and prove that this correctional centre condition leads to the spread of communicable diseases. Thus, I undertake an investigation into HIV and AIDS, and TB. The critical debate revolves around the fact that these are global problems. I then embark on an analysis into the judicial precedent in the High Court, Supreme Court of Appeal and more importantly the Constitutional Court. An analysis

[729]J Barnes "Not too 'Great Expectations': Considering the right to health care in prisons and its constitutional Implementation' (2009) 1 SACJ 48.
[730]National Health Act 61 of 2003 s 5.
[731]WFM Luyt 'South African Correctional Centres and the Need to Rethink Approaches to HIV/AIDS' (2008) 21(3) *Acta Criminologica* 139.
[732]Republic of South Africa's Report to the ACHPR Combined Second periodic report under the ACHPR 2002 – 2013 and Initial Report under the Protocol to the African Charter on the Rights of Women in Africa (August 2015) 22. Available at <http://www.achpr.org/files/sessions/58th/state-reports/2nd-2002-2015/staterep2 southafrica 2003 2014 eng.pdf> 82.

of case law that has emerged from the Constitutional Court is undertaken in an attempt to determine the extent of the impact that no medical facilities or minimal facilities have on inmates' rights as demonstrated in the *Lee* judgment. This chapter does not deal with the issue of medical parole, as this contentious issue falls outside the scope of my dissertation.

5.2. Transmission of Communicable Diseases in Correctional Centres

5.2.1. HIV and AIDS in General

It was noted that 9 million people died of HIV and AIDS in Africa in 2001 and was projected that 25 million people would be infected in the subsequent ten years. Thus, it was resolved that HIV and AIDS is predominately a human rights matter that poses a threat to humanity. It called upon authorities to allocate national budget in an attempt to mitigate the growth of HIV and AIDS patients and to make medication readily available to governments for the urgent distribution to affected persons.[733] Therefore, HIV and AIDS is not only a pandemic in Africa but in South Africa and furthermore is a pandemic in correctional centres. [734]

The World Health Organisation (WHO), Joint United Nations Programme on HIV and AIDS (UNAIDS) and United Nations Children's Fund (UNICEF), in 2002 estimated the South African statistics of the population of adults that had AIDS as 4 700 000.[735] On closer inspection into the mortality rate of the general population in 2001, it revealed that 360 000 adults and children died from AIDS.[736] In 2001, a Declaration entitled 'the Abuja Framework for Action for the Fight against HIV/AIDS, Tuberculosis and Other Related Infectious Diseases' came into being.[737] One of the major concerns levelled was that 'stigma, silence, denial and discrimination against people living with HIV and AIDS increases the impact of the epidemic and constitutes a major barrier to an effective response to it'.[738] These statistics and initiatives date back to more than 14 years ago,

[733]Resolution on the HIV/AIDS Pandemic – Threat Against Human Rights and Humanity (2001). Adopted by the African Commission on Human and Peoples' Rights at its 29th ordinary session in Tripoli, Libya, from 23 April to 7 May 2001. Available at <www.achpr.org>.
[734]The National Strategic Plan on HIV, STIs and TB 2012 – 2016 http://www.gov.za/sites/www.gov.za/files/national%20strategic%20plan%20on%20hiv%20stis%20and%tb 0.pdf
[735]L Louw *HIV/AIDS & Human Rights in South Africa* Centre for the Study of AIDS and Centre for Human Rights University of Pretoria (2004) 6.
[736]Ibid 7.
[737]The Abuja Framework for Action for the Fight against HIV/AIDS, tuberculosis and Other Related Infectious Diseases" Available at: <http://www.onusida-aoc.org/Eng/Abuja%20Declaration.htm> <www.un.org>.
[738]Ibid para 12.

but highlight the impact that HIV and AIDS had and still has on the South African population as a country as opposed to the isolated inmate population.

South Africa ascribes to a National five-year Projected Plan, which maps out the countries collective efforts in addressing HIV and AIDS. The DCS has to ensure that it performs under the national umbrella structures in place.[739] This will be discussed later in this chapter.

5.2.1.1. HIV and AIDS in Correctional Centres

The DCS strictly prohibit sex, rape, tattooing and intravenous drug use (use of drugs by needles).[740] However, DCS are fully aware of the rampant occurrence of these high-risk activities.[741] In 2006, approximately 10 years ago, DCS investigated and found that in Gauteng, HIV and syphilis rates amongst inmates was 19.8%. This percentage was higher than the 16.25% of the general HIV population in 2006.[742] The Committee against Torture (CAT Committee) raised concerns about South Africa's correctional centre overcrowding and the high incidence of HIV and AIDS, and tuberculosis. A recommendation was put forth for South Africa to implement more efficient mechanisms in improving correctional centre conditions.[743]

It has been fairly documented throughout the literature review and statistics of the World Health Organisation that inmates are a group of human beings that are more susceptible to contracting HIV and AIDS and other sexually transmitted diseases.[744] In fact, manifestation of sexually transmitted infections (STIs) amongst inmates are up to five times higher than the general population rates.[745] This alarming reality draws our attention to the rights of inmates being exposed to correctional centre conditions of poor hygiene due to overcrowding, sexual violence by fellow inmates, drug abuse and gang related practices.[746]

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[739]The National Strategic Plan on HIV, STIs and TB 2012 – 2016 (note 734 above).
[740]K Booyens & C Bezuidenhout 'Sex, Drugs and Tattooing in Correctional Facilities snd the Relationship to STIs, HIV and AIDS' (2015) 2 *Acta Criminologica* 147.
[741]Ibid 144.
[742]Ibid 145.
[743]Human Rights Council *Working Group on the Universal Periodic Review First session* Geneva, 7-18 April 2008 para 8.
[744]S Sifunda et al 'The Effectiveness of a Peer-Led HIV/AIDS and STI Health Education Intervention for Prison Inmates in South Africa' (August 2008) 35 (4) *Health, Education & Behavior* 495.
[745]Ibid.
[746]Ibid 495.

I concur with the negative debate surrounding the reliability of DCS' HIV and AIDS statistics. In 2009 for example, DCS reported that there was a 3% HIV rate.[747] However, JICS report estimated 40 to 60% of the South African population having HIV and AIDS. These extreme discrepancies in DCS records cast a shadow of doubt on their level of transparency and accountability regarding the reality of correctional centre conditions. Thus, it is arguable that DCS themselves are not privy to the exact number of inmates who are HIV positive and those that have AIDS.[748]

It is a known fact that HIV and AIDS spreads through the medium of contaminated blood and bodily fluids. Inmates engaging in unprotected sex is the root cause for the transmission of HIV. Booyens argues upon reference to various other experts in the field that the tissue inside the rectum tears during sexual penetration. This allows the victim to be more susceptible to contracting HIV amongst other sexually transmitted diseases, as the bodily fluids (semen) culminate with the blood in the open wound.[749]

The use of drugs by inmates to mask their experiences in correctional centres also contribute to the high-risk spread of HIV, as inmates share contaminated needles.[750] The use of drugs is clearly prohibited in correctional centres.[751] Therefore, inmates are unable to request the State to aid their illegal practice by supplying sterilisation products or even new needles. Whereas Switzerland for example, uses the 'Needle and Syringe Programme' where doctors and nurses dispense clean needles to inmates. Automatic vending machines could possibly serve the same purpose.[752] This system may reduce the transmission of HIV despite the aforementioned prohibition because it is commonly known that inmates still use drugs in correctional centres.

Gangs rituals dictate that every member must be identified by a tattoo which represents which gang they belong to.[753] Within correctional centres, there are no modern technologically friendly tattoo equipment. Inmates resort to puncturing themselves or each other with sharp objects such as needles, pins, bedsprings or even guitar strings.[754] Ballpoint ink or dyes are then used to stain

[747]Booyens & Bezuidenhout (note 740 above) 145.
[748]Ibid.
[749]Ibid146.
[750]Ibid 147 – 148.
[751]Ibid.
[752]Ibid.
[753]Ibid 148.
[754]Ibid.

open wounds. The procedure is highly unhygienic and multiple use of unsterilised equipment leads to the transmission of HIV.[755]

It is counterintuitive that majority of the population are of the perception that HIV and AIDS stays behind bars.[756] The reality is that inmate patterns are nomadic in the sense that they are either transferred to different correctional centres during the course of serving their sentence; alternatively, are released into the widespread population. This ultimately contributes to the spread of communicable diseases that permeate through the pariah walls of correctional centres into the communities at large.[757]

The extent of the impact of gangsterism, sexual violence and transmission of HIV and AIDS as enumerated in the chapter four above displays the veracity of the problem. However, one of the key problems that exacerbate the spread of HIV in correctional centres is the problem of overcrowding as discussed in chapter three above. Thus, poor nutrition, congested cells with inmates sleeping in close proximity of each other, bathing and using ablution facilities in the eyeshot of the next inmate allows for the indignation of inmate's rights. Other factors include inmates who already have HIV before entering a correctional centre and due to the exposure of the current correctional centre conditions, have unfavourable opportunities on their road to recover. Having HIV weakens the immune system and as such, these inmates become more prone to contracting communicable diseases such as tuberculosis.[758]

Goyer adopts a more pragmatic view by stating that the problem is more than just the media sensationalising the reality of HIV in correctional centres. I have a different opinion in this regard whereby every single inmate, be it a remand detainee, young petty thief or life incarcerated inmate, everyone deserves to be treated equally and have their rights respected. Thus, the example Goyer uses in passing, clearly demonstrates the extent of the impact that gangsterism and their sexual practices have on an individual and thereafter their right to access healthcare facilities. It is no anomaly that a young man is arrested for a petty crime, cannot pay bail, is raped and contracts HIV upon admission. Being a remand detainee, he is already sentenced to execution before having an

[755]Booyens & Bezuidenhout (note 740 above) 148.
[756]Sifunda et al (note 744 above) 495.
[757]Ibid.
[758]KC Goyer 'Prison Health is Public Health: HIV/AIDS and the case for Prison Reform' (2012) November 2 *SA Quarterly* 23.

opportunity to exercise his rights.[759] However, the crux of Goyer's debate lies at the heart of having approximately 300 000 ex-inmates return to the mainstream community annually. The veracity of the problem of spreading HIV in correctional centres heightens as HIV transmissions proliferate outside of correctional centres. This makes the exclusivity of the problem obsolete begging for South Africa to realise that 'Prison Health is Public Health'.[760]

HIV transmission is not the only evil. Sexually Transmitted Infections (STI's) such a genital sores and infections, create a medium for the spread and advancement into HIV or from HIV into full-blown AIDS.[761] It can be argued that when inmates are educated on the implications of HIV and AIDS, they are still in a precarious environment, where resources are inadequate and they remain at risk.

5.2.1.2. The Use of Condoms in an Attempt to Prevent the Transmission of HIV in Correctional Centres

There is a widespread debate on the controversial issue of DCS providing condoms in correctional centres. It accords with the Department of Health in the prevention of the spread of HIV in South Africa.[762] Therefore, it can easily be argued that the State is well aware of the human rights abuses in correctional centres and go so far as providing inmates with condom to curb the infringement of their constitutional rights. It is inconceivable for example, for the State to argue in a rape case of an inmate that condoms were provided, so the inmate was protected. There is an inherent stigma of male sexual activity in correctional centres that results in the culture of silence. This bewildering scenario hinders the use of condoms in correctional centres.[763] The condoms that are widely distributed in correctional centres are not suitable for anal penetration and inmates still stand the chance of contracting HIV. Condoms are placed in areas subject to public purview[764] and thus infringes on an inmate's right to privacy. Lubricant is not provided in dispensing condoms and condoms tear as a result.[765] I disagree with DCS' suggestion of instituting condom vending

[759]Goyer (note 758 above) 23.
[760]Ibid 23 – 24.
[761]Ibid 25.
[762]Ibid 496.
[763]Ibid.
[764]Ibid.
[765]Ibid.

machines, as this may be more cumbersome and embarrassing for inmates.[766] It is not clear whether these vending machines are free dispensaries or not. If money has to be paid for these basic commodities, it certainly violates inmates' rights to dignity. 'The fact that condoms are (in theory) provided to inmates, does not compensate for the scars caused by rape and other sexual incidences within the inmate population'.[767]

5.2.2. Tuberculosis in Correctional Centres

Minister Sibusiso Ndebele at the World TB Day hosted on 24 March 2013 stated that there is a dual epidemic of HIV and TB within our correctional centres.[768] The scourge is endemic within correctional centres as compared to the free population. The Minister further denounced issues of overcrowding, inferior correctional centre conditions and unsatisfactory medical care for inmates as the aggravating factors that contribute to the death toll within correctional centres.[769] At the same event, Deputy President Kgalema Motlanthe commented that our country has 'the highest number of people living with HIV… the third highest rate of TB infections in the world'.[770] The Deputy President also stated that HIV and TB share a symbiotic relationship insofar as one thrives off the other due to weak immune systems. He also stated that TB can be cured.[771]

TB is spread from one person to the next via an infected person's sputum. Coughing and sneezing for example allows for the transmission of TB to the host.[772] Predominant considerations are concentration of contaminated air, exposure to TB pathogens and space. A single sneeze projects approximately one million droplet nuclei which are expelled into the air.[773] A confined correctional centre cell with inadequate light, poor ventilation and overcrowded unhygienic

[766]Booyens & Bezuidenhout (note 740 above) 152 and 157.
[767]Luyt (note 626 above) 69.
[768]Speech by Minister Sibusiso Ndebele on World TB Day 24 March 2013 at Pollsmoor Prison. Available at <http://www.dcs.gov.za/UploadedFiles/Remarks%20by%20the%20Minister%20Mr%20Sibusiso%20Ndebele%20MP%20on%20World%20TB%20Day%20at%20Pollsmoor%20Correctional%20Centre.pdf
[769]Ibid.
[770]Ibid.
[771]Ibid.
[772]Department of Health Guidelines for the management of Tuberculosis, Human Immunodeficiency Virus and Sexually Transmitted Infections in Correctional Centres (April 2013) 2 (www.doh.gov.za) Available at: <http://www.section27.org.za/wp-content/uploads/2013/05/Guidelines-for-the-management-of-Tuberculosis-Human-Immunodeficiency-Virus-and-Sexually-Transmitted-Infections-in-Correctional-Centres-2013.pdf>.
[773]Ibid.

conditions provides the perfect breeding ground for the spread of TB. An HIV positive person's immune system is weaker and as a result, he/she is more susceptible to contracting TB. The initial stages of TB do not present symptoms and last for about 4 – 6 weeks.[774] Thereafter, the infection sets in within a few months and becomes a disease. It is common for reactivation of dormant bacteria or re-infection.[775] The case law analysis will now follow where I unpack the problem of tuberculosis in correctional centres in the *Lee* case.

5.3. Impact of Limited or No Access to Healthcare on Inmates' Rights

I analyse South Africa's judicial precedent in the High Court, Supreme Court of Appeal and Constitutional Court to demonstrate the principles that have emerged in relation to HIV and AIDS in correctional centres. Thereafter, the specific constitutional case of *Lee v Minister of Correctional Services*[776] will be critically discussed. I deal with this case predominantly to highlight the impact of limited or no access to healthcare when diagnosed with tuberculosis on inmate's right to healthcare. As I have already discussed the implications of the *McCallum* case in the previous chapter, I do not delve into the merits of the case here, as it would be repetitious. Although, it must be stated that the outcome in the *McCallum* case as cruel, inhuman and degrading treatment also extended to his limited access to healthcare in the St Albans prison.[777] The State's obligations in relation to the inmates' right to healthcare is clearly surmised by the Human Rights Committee in the *McCallum* case as follows:

> With regard to the author's complaint alleging a denial to access to medical care after the author's ill-treatment on 17 July 2005, the Committee notes the information in the author's medical history, according to which he was taken to the prison hospital on 31 August 2005. The Committee reiterates that persons deprived of their liberty may not be subjected to any hardship or constraint other than that resulting from the deprivation of liberty, and that they must be treated in accordance with, inter alia, the United Nations Standard Minimum Rules for the Treatment of Prisoners. The Committee reiterates that it is the State party's obligation to provide for the security and well-being of persons deprived of their liberty. It observes that despite the author's request to see a doctor immediately after the incident on 17 July 2005, according to the medical record before the Committee, he received his first medical attention on 31 August 2005. The Committee considers that the delay between the author's request for medical examination and the prison authorities

[774]Department of Health Guidelines (note 772 above).
[775]Ibid 2 – 3.
[776]*Lee v The Minister of Correctional Services* 2013 (2) SA 144 CC/ CCT20/2012 ZACC 30.
[777]*Bradley McCallum* (note 641 above).

response is such that it amounts to a violation of the author's right under article 10, paragraph1, of the Covenant.[778]

Medical healthcare comprises of the physical, mental and emotional health of an inmate. Van Zyl J enumerated that 831 natural deaths cases were investigated. The death certificates and medical practitioner's reports were scrutinized and JICS found that approximately 80 inmates died of tuberculosis.[779] He also stated that many unnatural deaths are caused by suicides.[780] Many die of secondary causes of death incidental to HIV and AIDS that are preventable.[781] The World Health Organisation emphasises the mortality rate of suicides in correctional centres and make it an international health aim to prevent suicide.[782] Mental health professionals must also be made available to inmates.[783]

JICS reported in their quarterly meeting that an inmate was taken to hospital and died gasping for air. The post mortem report was absent to confirm whether the inmate died of tuberculosis that was not detected or treated.[784] A more detailed list of categories of natural deaths are presented in the quarterly reports than their annual reports. The list of categories included AIDS and TB. Almost half of the number of unnatural deaths were enlisted as 'natural causes – other'.[785]

It is important to emphasise that HIV and AIDS patients can die of secondary causes of death. These include meningitis, pneumonia, respiratory disorders and tuberculosis. Thus, the death certificate will reflect the secondary cause of death not HIV and AIDS. This problem is exacerbated in the reporting and monitoring of correctional centre records. Thus, the statistics do not reflect the true status of HIV patients dying of AIDS.[786] The Judicial Inspectorate also noted that 25 of the 90 inspected correctional centres experienced a shortage of nurses.[787] Thus, effective policies are required to address the problem of HIV and TB in correctional centres as it directly impacts on inmates' right to life.

[778]Bradley McCallum (note 641 above) 10 para 6.8.
[779]Annual Report of the JICS (2010/2011) 25.
[780]Ibid 24.
[781]WJP Conference (note 24 above) 15.
[782]World Health Organisation *Preventing Suicide: A resource for Prison Officers, Mental and Behavioral Disorders* Department of Mental Health Geneva (2000) 5.
[783]Ibid 6 – 12.
[784]JICS Quarterly Report for October to December 2015 (note 683 above) 63 – 64.
[785]Ibid 70.
[786]Ibid.
[787]Annual Report of the JICS (2014/ 2015) 52 – 53.

5.3.1. Principles from Case Law that enforce Inmates' Rights to Healthcare Facilities

The High Court has previously ruled that an inmate who was in the last stages of HIV should be granted an early release. The reasoning was that such a person whilst serving his sentence would be serving a harsher sentence in his condition.[788] In the case of *Mazibuko v Minister of Correctional Services and Others*, a similar line of judgment was utilised in relation to medical parole of an applicant dying of AIDS.[789] The Court held that: 'Mercy is a hallmark of a civilised and democratic country. The applicant in the circumstances that he finds himself in requires to be treated with mercy, within the precincts of the law'.[790]

The health of a terminally ill inmate was decided in the case of *Stanfield v Minister of Correctional Services and Others.*[791] The Applicant was 48 years old, convicted for committing fraud.[792] Standfield developed incurable lung cancer.[793] He needed a medical facility in the jurisdiction of DCS which did not exist.[794] The Court held: 'The applicant is fully entitled to spend the remaining portion of his life ensconced in his own home….When the time comes for him to pass on, he must be able to do so peacefully and in accordance with his inherent right to dignity'.[795] The Court held that '[e]ven the worst of convicted criminals should be entitled to a humane and dignified death'.[796]

In the case of *C v Minster of Correctional Services*, blood sample was taken from the plaintiff and then tested for HIV.[797] The correctional officials did not obtain proper informed consent from the inmate. The court held that HIV testing required the inmate's proper informed consent and pre-counselling. Thus, damages was awarded to the plaintiff.[798]

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[788]*S v Cloete* 1995 (1) SACR 367 (W).
[789]*Mazibuko v Minister of Correctional Services and Others* 2007 JOL 18957 (SAHC 2005 T) 229.
[790]Ibid.
[791]*Stanfield v Minister of Correctional Services and Others* 2004 (4) SA 43 (C) (SAHC 2003) 225 para 128.2003(4) All SA 282 (C).
[792]Ibid para 4.
[793]Ibid para 7.
[794]Ibid para116.
[795]Ibid para 132.
[796]Ibid para 4.
[797]*C v Minster of Correctional Services* 1996 (4) SA 292 (T) 235.
[798]Ibid.

The case of *Van Vuuren and Another NNO v Kruger*, the first defendant was the plaintiff's doctor who requested that he prepare a medical report for the purposes of insurance.[799] The plaintiff was tested HIV positive. At golf game, the doctor disclosed the plaintiff's HIV status to three other doctors.[800] The Supreme Court of Appeal emphasised a person's right to privacy as valuable and awarded the applicant damages for the doctor's breach of disclosing a patient's HIV status.[801]

The Court order in *W and Others v Minister of Correctional Services* held that the State must: keep inmates' status confidential, provide condoms and treatment, conduct HIV testing upon consent by the inmate, not to discriminate against HIV infected inmates regarding cell space and abolition facilities and to provide HIV and AIDS education.[802]

The landmark *Treatment Action Campaign*[803] dealt with the provision of State funded nevirapine (ARVs) to mothers and babies in government hospitals. The Constitutional Court case stated:

> The state is obliged to take reasonable measures progressively to eliminate or reduce the large areas of severe deprivation that afflict our society. The courts will guarantee that the democratic processes are protected so as to ensure accountability, responsiveness and openness, as the Constitution requires in section 1. As the Bill of Rights indicates, their function in respect of socio-economic rights is directed towards ensuring that legislative and other measures taken by the state are reasonable. As this Court said in *Grootboom*, "[i]t is necessary to recognise that a wide range of possible measures could be adopted by the State to meet its obligations".[804]

The aforementioned quote highlights the importance of the State to meet its obligations in the correctional centre context.

The Constitutional Court in *Van Biljon v Minister of Correctional Services*[805] ruled in favour of two HIV-positive inmates who demanded that the State supply them with their prescribed ARV (anti-retroviral) drugs.[806] In 2007, the court ordered the respondent to provide fifteen HIV positive inmates with ARV treatment. The court agreed with the applicants argument as stated in their

[799]*Van Vuuren and Another NNO v Kruger* 1993 (4) SA 842 (SAA) 231 para 4.
[800]Ibid para 5.
[801]Ibid para 44 – 47.
[802]*W and others v Minister of Correctional Services* (Cape Town Supreme Court of Appeal) 2434/96.
[803]*Minister of Health and Others v Treatment Action Campaign and Others* 2002 (5) SA 717 (SACC).
[804]Ibid para 36.
[805]*Van Biljon v Minister of Correctional Services* 1997 (2) SACR 50 (C).
[806]Ibid

heads of argument that: 'the Respondent's implementation of the laws and policies is unreasonable in that: (a) it is inflexible; (b) it is characterised by unjustified and unexplained delay, and (c) some of the steps taken by the Respondents after the institution of these proceedings, in particular the manner in which the appointments were set up, are irrational'.[807]

The above is a single occasion that was resolved, there are numerous unreported cases where inmates have to wait for lengthy periods before receiving medication. Inmates are ignorant to the medical jargon and diseases that they are diagnosed with and as a result, they do not know what the implications to their life are. Having fewer staff to tend to the needs of the inmates who are chronic patients indirectly infringes on their constitutional rights to life and human dignity.[808] The aforementioned principles from case law reinforces inmates' rights to healthcare. International instruments as illustrated in chapter two of this dissertation holistically protect these rights.[809]

5.3.2. Principles from *Lee* Case that enforces Inmates' Right to Healthcare in the Context of TB and Implications

5.3.2.1. Facts and Issues in the *Lee* Case

An eminent South African case in the SCA is *The Minister of Correctional Services v Lee*.[810] Lee was admitted to a correctional centre in November 1999 for money laundering amongst others. In February 2000, he was released on bail and thereafter re-arrested in April 2000. During his four years in the correctional centre, he appeared in court approximately seventy times before he was freed in September 2004. The inmate, Lee, was diagnosed with pulmonary tuberculosis and cured within six months over a three year term in a correctional centre. The issue arose when Lee sued the Minister of Correctional Services for delictual damages contending that the correctional authorities negligently failed to take reasonable steps to protect him from contracting tuberculosis. The omission resulted in his illness and violation to his physical integrity.[811] The Court held that

[807]*EN and Others v Government of the RSA and Others* 2007 (1) BCLR 84 para 35.
[808]Singh (note 98 above) 69 – 70.
[809]Articles 1, 2, 3 and 16 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), (note 131 above). Supported by Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. A/RES/57/199, adopted Dec. 18, 2002 [reprinted in 42 I.L.M. 26 (2003)].
[810]*The Minister of Correctional Services v Lee* [2012] ZASCA 23 (23 March 2012) (316/11).
[811]Ibid para 1 – 4.

the correctional authorities failed to implement a suitable management procedure in dealing with the disease and were negligent in this respect.[812] Nugent J highlighted that staff shortages are key to tuberculosis control. There is no guarantee for correctional officials to prevent tuberculosis, as they are only required to take reasonable steps.[813] The Court held that it could not find that 'but for'[814] the omission (causation) Lee probably would not have contracted tuberculosis.[815]

Many contradictions concerning the application of 'the but' for test amongst others surfaced from the SCA's controversial judgment. Consequently, the matter was brought before the Constitutional Court on 28 August 2012.[816] The *Amici Curiae's*[817] heads of argument emphasises that the SCA erred in applying the 'but for' test for causation as it created and placed a more onerous burden of proof on Lee in spite of the B Order.[818] They argued in line with section 39(2) of the Constitution.[819] The *Amici Curiae* referred the Court to consult with the Judicial Inspectorate's Report 2010/2011[820] and Robin Wood's study.[821]

Robin Wood and a team of medical experts can attest to the fact that South Africa's correctional centre conditions create a breeding ground for the spread of tuberculosis.[822] They conducted a medical experiment using the *Lee* judgment's evidence of data revealing cell size, occupancy, and lock up time, the incidence and tuberculosis medication and inserted these figures into a Wells-

[812]*The Minister of Correctional Services v Lee* para 44.
[813]Ibid para 58 – 59.
[814]The 'but for' test is commonly referred to as the *conditio sine qua non* theory. J Neethling, JM Potgieter & PJ Visser *Law of Delict* 4th ed (2001) 175. 'The enquiry as to the factual causation is generally conducted by applying the so-called 'but-for' test, which is designed to determine whether a postulated cause can be identified as a *sine qua non* loss in question. In order to apply this test one must make a hypothetical enquiry as to what probably would have happened but for the wrongful conduct of the defendant. This enquiry may involve the mental elimination of the wrongful conduct and the substitution of a hypothetical course of lawful conduct and the posing of the question as to whether upon such a hypothesis plaintiff's loss would have ensued or not. If it would in any event have ensued, then the wrongful conduct was not the cause of the plaintiff's loss: aliter, if it would not so have ensued.' *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) 700.
[815]*The Minister of Correctional Services v Lee* para 64.
[816]*Lee v The Minister of Correctional Services* CCT20/2012 *Amici Curiae's* Heads of Argument obtained from WJP.
[817]The *Amici Curiae* were the Treatment Action Campaign (TAC), Wits Justice Project (WJP) and the Centre for Applied Legal Studies (CALS).
[818]Ibid para 5-6.
[819]Section 39(2) of the Constitution states 'when interpreting any legislation, and when developing the common law…, every court…must promote the spirit, purport and objects of the Bill of Rights.'
[820]Annual Report of the DCS (2010/2011).
[821]Robertson et al (note 481 above).
[822]Ibid 809.

Riley equation.[823] The results proved that overcrowding in communal cells causes an increase of 90% of tuberculosis rate per annum. The study revealed a dire need to comply with at least national minimum standards or even international standards of cell recommendation to reduce the risk of tuberculosis transmission by 30% and 50%, respectively.[824]

One of the major challenges that Lee faced in the SCA decision was actually proving the source of his infection to establish a causal nexus between the correctional authority's negligence and his illness.[825] The expert affidavit of Robin Wood reiterates their study's findings and attests to the fact that it is scientifically impossible to prove the exact source of the tuberculosis infection. The determination of the specific individual, time and place of where the tuberculosis bacterium was transmitted to Lee is in fact impossible to prove with certainty.[826] It is clear that the question of causation proves to be difficult in the circumstances.

Two of the fundamental constitutional questions that were raised in the Applicant's Heads of Argument in the Constitutional Court were the following:

> 13.1.1. whether the state can avoid a personal duty, in the law of delict, to compensate the applicant for physical harm (infection with tuberculosis) caused to him with constructive intention, alternatively with negligence, by limiting applicant's rights to freedom and security, (viz.the right not to be treated in an inhuman way), and to conditions of detention that are inconsistent with human dignity, including at least the provision, at state expense, of adequate accommodation and medical treatment.
>
> 13.1.2. Whether the applicant was guaranteed a fair hearing before the SCA in the absence of the approach contended for in the applicant's submissions.[827]

It must be emphasised, that these two fundamental questions, in my opinion, not only extend to Lee but are pertinent to every inmate in South Africa. Thus, the findings of the Lee judgment is groundbreaking and opens up the floodgates of liability of the State.

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[823]Wells-Riley equation: 'a well-known transmission model that has been applied to a wide range of transmission scenarios, including describing airborne transmission probabilities within a single enclosed room or space with defined ventilation characteristics.' Robertson et al (note 481 above) 810.
[824]Ibid 809 – 813.
[825]*The Minister of Correctional Services v Lee* para 64.
[826]*Lee v The Minister of Correctional Services* CCT20/2012 Expert Affidavit of Professor Robin Wood (obtained from WJP).
[827]*Lee v The Minister of Correctional Services* CCT20/2012 Applicant's Heads of Argument obtained from WJP at para 7. This is read in conjunction with section 12 (1) (e) and 35 (2) (e) of the Constitution.

5.3.2.2. The Constitutional Court's Findings in the *Lee* Case

Nkabinde J rightly reverted to the findings in the High Court where measures were posited to the State in preventing and curbing tuberculosis. These entailed early detection of vulnerable inmates and those that are chronically suffering, awareness of the disease, the provision of medication and appropriate food at State expense to the affected inmates.[828] The Constitutional Court held that the SCA erred in its application of the tests for legal and factual causation in delict. South African law permits the use of a flexible approach to the test and does not place an evidentiary burden on a party to prove the likes of a hypothetical test.[829]

It is privy to reiterate that Nkabinde J held that DCS have a duty to provide adequate health care services and to uphold an inmate's right to dignified correctional centre conditions. 'It is not in dispute that in relation to Pollsmoor the responsible authorities were aware that there was an appreciable risk of infection and contagion of TB in crowded living circumstances. Being aware of that risk they had a duty to take reasonable measures to reduce the risk of contagion'.[830] I find that is very ironic to caution DCS who is a law enforcing institution of its own duty to abide by the laws that it promulgated. It is no anomaly that the DCS has to act within the confines of the Constitution. As such, in the *Van Duivenboden* case,[831] the SCA reminded the State of its positive duty in terms of section 7 (2) of the Constitution: 'the state must respect, protect, promote and fulfil the rights in the Bill of Rights'. 'This, including the requirements of accountability and responsiveness, provides 'additional' reasons for finding in favour of the applicant and imposing delictual liability.'[832]

Cameron J in his dissenting judgment in the *Lee* case raised a very important aspect for the need to develop the common law. There is a national interest in the creation of a sustainable correctional centre approach in reducing the risk of contact with contagions in correctional centres.[833] Thus in

[828]*Lee v The Minister of Correctional Services* 2013 (2) SA 144 CC/ CCT20/2012 ZACC30 para 14.
[829]Ibid para 38 and 43.
[830]Ibid para 59.
[831]*Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) para 20.
[832]*F v Minister of Safety and Security and Others* (2011) ZACC 37; 2012 (1) SA 536 (CC); 2012 (3) BCLR 244 (CC) para 123
[833]*Lee v The Minister of Correctional Services* para 113 – 116 *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC). 'where the common law deviates from the spirit, purport and objects of the Bill of Rights the courts have an obligation to develop it by removing that deviation'.

order to reduce the risk of TB in correctional centres, the common law needs to be developed to enforce inmates' right to healthcare.

The Constitutional Court ordered against the Minister of Correctional Services by setting aside the SCA's order and declaring that the Minister is liable to Lee in delict and that the case is remitted to the High Court for the determination of the quantum of damages. A costs order against the Minister was also ordered.[834]

5.3.2.3. Implications of the *Lee* Judgment

The *Lee* judgment has been severely criticised by many authors. The debate surrounds the factual causation test. Paizes is of the view that the minority's judgment led by Cameron J is 'irresistible' in relation to the reasons set forth in the judgment.[835] However, Paizes uses a different analogy comparing the setting up of a correctional centre to that of a railway system. It is understandable that correctional centres are privy to risks such as the transmission of communicable diseases. The condition to this analogy is that correctional centres must have these risks under control and treated, then these risks are permissible by our law. Lee's case was different as the State had no system to control tuberculosis and the risks were impermissible. Therefore, any act or omission by the State that exposed Lee to tuberculosis is 'wrongful' in the words of Paizes. Paizes proffers that if the *sine qua non* test is operated on the 'wrongful conduct' of the State as opposed to the negligent conduct, the test to factual causation becomes workable.[836] The concept of 'reasonable conduct' nullifying fault leads to a discussion on the apportionment of damages and the so-called 'partial-excuse'.[837] However, Paizes offers a logical application of the causation test. This allows the reader of the Lee case to understand the outcome and avoid misinterpreting the future application of it.

[834]*Lee v The Minister of Correctional Services* para 76 and 77.
[835]A Paizes 'Factual Causation: Which 'Conditio' must be a 'Sine Qua Non'? A Critical Discussion of the decision of *Lee v Minister of Correctional Services*' (2014) 131 *The South African Law Journal* 501.
[836]Ibid 504.
[837]Ibid 509. I will discuss this later in this chapter.

Price on the other hand delves into the debate as to whether constitutional damages or delictual damages were fit in the *Lee* case.[838] He poses a relevant question as to whether the imposition on the State to pay delictual damages has any impact at all.[839]

One of the major criticisms was for the Constitutional Court to codify the correct application of the factual causation tests instead of the so-called 'flexible condition *sine qua non* test'. Therefore, the test's practicality is left to mental speculation regarding the facts of a matter before the court.[840]

Nienaber makes a very relevant argument in so far as applying the logic in the *Lee* judgment. She contemplates whether the State can also be liable for the wrongful transmission of HIV in correctional centres.[841] Nienaber reasons that in the *Lee* judgment, the Constitutional Court held that factual causation cannot be proved where it is impossible to pinpoint the exact source of the infection. Thus, the corollary applies to HIV and opens the floodgates of liability for the State.[842]

Going back to the argument of apportionment of damages,[843] I would like to hypothesise that if the State is held liable to pay damages for the wrongful exposure of inmates to tuberculosis, can a fellow inmate rapist be liable for the transmission of HIV to an inmate who falls victim to rape? In cases where gang leader metes out the 'slow puncture'[844] sentence where an HIV positive gangster rapes a new inmate knowing that he will become infected and eventually die. In the case of *Venter v Nel*, the High Court ordered the defendant to pay the plaintiff damages for infecting her with HIV. [845] Thus, it is possible for a victim to sue a rapist inmate for damages in wrongfully transmitting HIV to him. The conundrum lies at the heart of the apportionment of damages. The State is now solely liable as stated in the *Lee* case. Apportioning part or all of the blame to a rapist inmate may not be feasible, as the rapist may be too poor to pay damages or is a serial offender.

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[838]A Price 'Factual Causation after Lee' (2014)131(Part 3) *The South African Law Journal* 498.
[839]Ibid.
[840]CJ Visser and C Kennedy-Good 'The Emergence of a "Flexible" Conditio Sine Qua Non Test to Factual Causation?'(2015) *Obiter* 163.
[841]Nienaber 'Liability for the wrongful transmission of communicable diseases in South African prisons: What about HIV?'(2013) 28 *SAPL*165.
[842]Ibid 171.
[843]As allowed for in delict under the Apportionment of Damages Act 34 of 1965.
[844]WFM Luyt 'South African Correctional Centres and the Need to Rethink Approaches to HIV/AIDS' (2008) 21(3) *Acta Criminologica* 153. 'A non-conforming inmate will be punished by being raped by a HIV positive inmate. The sentence is called the 'slow puncture' as it will gradually cause death.'
[845]*Venter v Nel* 1997 (4) SA 1014 (SAHC D) 246.

From the aforementioned debate, it is obvious that inmates' rights litigation is creating room for protection of inmates. However, it is arguable that financial constraints and inmates lack of knowledge regarding groundbreaking litigation can be seen as obstacles in enforcing inmates' rights in South Africa.

5.3.2.4. The Impact of the *Lee* Case on the State of Access to Health Care in South African Correctional Centres

It is significant to point out that the 2013/2014 and 2014/2015 Annual DCS Reports do not document the groundbreaking *Lee* case under its relevant court ruling section.[846] This omission is not a mistake as over three years subsequent to the judgment, the Annual DCS reports do not acknowledge or note the implications of the *Lee* judgment.

This negative attitude of the DCS to abide by its own laws was further reinforced by the critical observations made in Justice Cameron's correctional centre visit report to Pollsmoor.[847] Justice Cameron's correctional centre visit findings three years later in the same Pollsmoor correctional centre in which Lee was incarcerated in, serves to emphasise the DCS's compliance with the judgment and whether it made a significant impact on the other inmates' rights.

Justice Cameron and his team observed that there were 28 nurses who were expected to service the health needs of 8 000 inmates at Pollsmoor.[848] Inmates were waiting in corridors for medical treatment. The correctional centres medical compliment comprises of one doctor and one dentist. It must be highlighted that the one doctor is an old retired man who works on a locum basis. The doctor complained that basic medical supplies such as injections and bandages were not available. There are substantial delays in procuring medication.[849] Insufficient stock and staff shortages with a single pharmacist stifles an inmate's access to healthcare.[850] Due to overcrowding, lack of hot water and the degree of uncleanliness in cells, scabies is a common health problem that is experienced.[851] The inmates showed the interviewers their physical injuries and complained that

[846]Annual Report of the DCS (2013/ 2014) 23 and Annual Report of the DCS (2014/ 2015) 25.
[847]Pollsmoor Report (note 427 above). Reliance on this report in my dissertation is of critical importance as Justice Cameron sat on the bench of Constitutional Court judges in the Lee case in 2012.
[848]Ibid 9 para 23.
[849]Ibid 11 – 12 para 34 – 37.
[850]Ibid 12 para 39.
[851]Ibid 13 para 41.

the medical staff neglect their needs. Inmates are not given an opportunity to consult with the doctor.[852] Medical staff ignore inmate's medical complaints and rush through medical examinations. When inmate's health conditions turn severe, they are not allowed to go to a hospital.[853] The correctional centre cells were not equipped with condoms.[854] The pharmacist stated that there is a shortage of tuberculosis medication.[855] There are 276 inmates on ARVs and ARVs are not dispensed to a considerable number of inmates who have not been tested for HIV.[856]

Justice Cameron urged the correctional centre to make a concerted effort in improving an inmate's access to healthcare.[857] Therefore, evidence that is presented in this report nearly three years after the Lee judgment is a true reflection of the extent of the impact of South Africa's correctional centre conditions on inmates' rights. Undoubtedly, it is safe to conclude that South Africa is not meeting their domestic, regional and international obligations and as a result are infringing on an inmate's right to access healthcare. After the *Lee* judgment, a reasonable man would think that the correctional centre conditions should improve to avoid any further liability. However, DCS in the Pollsmoor correctional centre evidences that correctional centre conditions continue to infringe on inmates' rights despite the Constitutional Court judgment.

The DCS's Strategic plan as projected for 2019 – 2020, makes reference to the National Development Plan's 2030 vision, which 'envisages a health system that works for everyone, produces positive health outcomes and is accessible to all'. The DCS strategises to undertake HIV testing from their baseline of 68% in 2013/2014 period to 90% in 2019/2020. Thereafter, 98% will be registered on the antiretroviral therapy program by 2020.[858] This is a rather astounding strategy. DCS wants to take approximately 5 years to test all its inmates. In 2020, majority of HIV positive inmates will be on ARVs. This evidences the fact that DCS does not have the correct number of inmates infected by HIV and therefore the inmates' rights to ARVs are being jeopardised.

[852]Pollsmoor Report (note 427 above) 16.
[853]Ibid 17 para 60.
[854]Ibid 18 para 63.
[855]Ibid 22 para 80.
[856]Ibid 23 para 85.
[857]Ibid 34 – 35.
[858]DCS Strategic Plan for 2015/2016 – 2019 – 2020 (note 507 above) 7.

5.3.2.5. The State of Access to Healthcare in South African Correctional Centres after the *Lee* Case

In 2012/2013, JICS reported that a health care survey was conducted in 2011/2012 which showed that 38% of inmates were not medically examined within 24 hours of their admission and were not advised of their right to healthcare. Immediate medical treatment was not given to 54% of inmates which amounts to a breach of the DCS policy. JICS noted that DCS did not take their recommendations into account since 2011.[859]

In 2014/2015, DCS listed one of the achievements connected to the R19.72 billion budget as the strengthening of HIV and TB prevention and management programmes in correctional centres and monitoring of inmate patients.[860]

The Annual DCS report for 2015/2016 revealed successful treatment of TB and HIV and AIDS in correctional centres. DCS has committed to the health goals agreed to in the National Development Plan Vision 2030 to increase the life expectancy of inmates in South Africa. DCS' reaction to a rigorous campaign to eliminate TB has been rated 'the leading cause of deaths from natural causes in South Africa'. In 2015/2016, the DCS reached a TB cure rate of 83.43% (1239/1485). More positively, for HIV and AIDS, 98% (21 722/22 142) inmates have been placed on Anti-Retroviral Therapy (ART).[861] JICS noted that number of natural deaths in correctional centres have been reduced from 1 689 in 2004/05 to 511 in 2015/2016. Two correctional centres had no inmates who were HIV positive or required ART.[862]

South Africa is adhering to the target of achieving an average of a 70 year life expectancy for everyone by 2030 as projected in the National Development Plan. South Africa has the world's biggest number of people on ART. The South African HIV and TB Investment case has greatly assisted to balance the management of HIV and TB, the treatment and cost associated with maintaining and controlling these diseases.[863]

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[859]Annual Report of the JICS (2012/ 2013) 51.
[860]Annual Report of the JICS (2014/ 2015) 10.
[861]Annual Report of the DCS (2015/2016) 10.
[862]Annual Report of the JICS (2015/ 2016) 54.
[863]South African National Aids Council *South African HIV and TB Investment Case Reference Report Phase 1* (March 2016)| 9 – 10. Available at: <http://sanac.org.za/wp-content/uploads/2016/03/1603-Summary-Report-LowRes-18-Mar.pdf>

In 2013, the State (South African government), the Global Fund to Fight AIDS, Tuberculosis and Malaria and the United States President's Emergency Plan for AIDS Relief (PEPFAR) invested R22.1 billion for HIV and TB programs in South Africa. During the 2011 to 2013 period, HIV and TB funding increased by 27%. Over this same period, the South African government spending increased from 76% to 80%. HIV care comprises of approximately 39% of total spending whereas TB funding amounts to 19% of the total funding.[864] The total amount spent by the South African government, United States Government and the Global Fund was R17.4 billion in 2011, R19.2 billion in 2012 and R22.1 billion in 2013.[865] It is clear from the amounts spent and invested that the ART and TB treatment is a priority in South Africa and these efforts extend to inmates too.

The need to confront HIV in correctional centres is central to the functions of WHO and UNAIDS. The 2016-2021 UNAIDS Strategy - the Fast-Track to end AIDS - is a new motivation for taking action.[866] The UNAIDS Programme at their 37th meeting in Geneva identified the need to invest in the reduction of HIV and AIDS so that no one gets left behind.[867] These initiatives also extend inmates in the treatment of HIV and AIDS in correctional centres.

UNAIDS succinctly summarises the number of factors that affect inmates falling behind as:

> (1) the overrepresentation of key populations and unsafe practices; (2) overcrowding, poor hygiene and nutrition; (3) violence, including sexual violence, experienced particularly by women and young people; (4) lack of access to basic health services and high prevalence of various communicable diseases; and (5) human rights violations, stigma and discrimination.[868]

Statistics illustrate that approximately 30 million people spend time in a correctional centre or closed setting. Upon release, inmates return to the community. The treatment and care of treatment of HIV in correctional centres is paramount and interconnected to public health.[869]

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[864]South African National Aids Council (note 863 above) 20.
[865]Ibid 57.
[866]UNAIDS Programme Coordinating Board 'Thirty- Seventh Meeting: 26 – 28 October 2015' Geneva 4. Available at <http://www.unaids.org/en/aboutunaids/unaidsprogrammecoordinatingboard/PCB37_26-28October2015>
[867]Ibid.
[868]Ibid.
[869]Ibid 5.

UNAIDS report highlighted that:

> South Africa is an exceptional example of voluntary HIV testing and antiretroviral treatment provision in the prison system. The most recent data show an increase in prisoners who tested for HIV from 50% in 2012-2013 to 68.7% in 2013-2014; 95.7% of prisoners living with HIV received antiretroviral therapy (15,417 and 16,109, respectively) in 2013-14. Further, 75% of sentenced prisoners with TB were treated and cured.[870]

Therefore, the Lee case has significantly impacted on the current state of healthcare in correctional centres. The State has made a significant improvement with the aid of sponsors to ensure that inmates receive HIV and AIDS treatment and TB medication.

5.4. Policies to address TB, HIV and STIs in correctional centres

The correctional centre environment is conducive for the transmission of HIV. This can be construed as a high risk environment.[871] The guidelines for the management of TB, HIV and STIs in correctional centres was implemented in 2013. It suggests that policies must be implemented to eradicate the risk of HIV infection to inmates.[872] Correctional centres need to ensure that adequate preventative measures are put in place. HIV and TB must be detected at the onset of the admission of inmates and thereafter screened every six months. The inmate must assume treatment within 48 hours of diagnosis. Furthermore, a comprehensive monitoring program should be created to chart the progress of the disease, thereby safeguarding an inmate's right to healthcare and life.[873] These Guidelines provide detailed obligations of doctors, nurses and DCS staff. At the very inception of access to healthcare, inmates must have access to HIV counselling and testing. This means that upon entry into a correctional centre, all inmates should also be screened for 'anal, oral and genital STIs'.[874]

The National Strategic Plan on HIV, STIs and TB (NSP) is aligned to the zero tolerance policy advocated by UNAIDS. South Africa envisions that within the next 20 years, there must be 'zero

[870]UNAIDS Programme Coordinating Board (note 866 above) 20.
[871]Booyens & Bezuidenhout (note 740 above) 146, UNAIDS Programme Coordinating Board (note 866 above) 5.
[872]Department of Health Guidelines for the management of Tuberculosis, Human Immunodeficiency Virus and Sexually Transmitted Infections in Correctional Centres. (note 722 above) (VIII).
[873]Ibid 2.
[874]Ibid 6 – 7. Read in conjunction with the Correctional Services Act, regulations and the empowering provisions of the Nelson Mandela Guidelines.

new HIV and TB infection' and 'zero preventable deaths associated with HIV and TB'.[875] The NSP further aspired in 2012 that by 2016 the following goals would be achieved amongst others: 'reduction of new HIV infections by 50%' and 'reduction of new TB infections and deaths by 50%'. It is debatable, given the above exposition that these goals have not been brought to fruition by DCSs national obligations.[876]

Comparative jurisprudence such as the Dublin Declaration on HIV and AIDS in correctional centres also prove useful. Article 1 of such Declaration clearly states an inmate's rights as 'Prisoners have a right to protect themselves against HIV…Prisoners living with HIV/AIDS have a right to protect themselves from re-infection and/or co-infection with Hepatitis C and/or TB'.[877] The use of simple defined rights spelling out rights in relation to HIV and AIDS, can assist in implementing and applying legislation. I believe that South Africa can also learn from other jurisdictions who are leading by example.

The Judicial inspectorate observed that the two DCS goals were to improve the Emergency Support Team (EST) and to ensure that inmates undergo health assessments.[878] These two goals have not been formally addressed by DCS to date. Thus, JICS advocated that inmate's healthcare is non-negotiable and that urgent intervention should be sought.[879] In the 2014/2015 period, 57 175 complaints regarding healthcare were received. This means that more than a third of the total correctional centre population have trouble in accessing proper healthcare.[880]

Goyer succinctly concludes: 'The current policies to address HIV in prison include a deeply flawed condom distribution policy, a weakly implemented HIV testing policy, and inconsistent, if not entirely inadequate, treatment and health care'.[881]

Sifunda et al provide a very structured and well-reasoned argument which informed their practical study that offers an optimistic solution to correctional centre health. They observe that generally, inmates upon release are unemployed and do not have steady homes or jobs. Thus, monitoring and

[875]The National Strategic Plan on HIV, STIs and TB 2012 – 2016 (note 734 above) 12.
[876]Ibid.
[877]WFM Luyt 'A Critical View on HIV/AIDS in South African Prisons within the Framework of the Dublin Declaration on HIV/AIDS in Prisons' (2005) 18 Issue *2 Acta Criminologica* 82.
[878]Correctional Services Act s 6(5) (b).
[879]Annual Report of the JICS (2014/ 2015) 40.
[880]Annual Report of the DCS (2014/ 2015) 77.
[881]Goyer (note 758 above) 26.

controlling the risk of HIV and AIDS continues even after being in a correctional centre. Thus, in order for the State to avoid further curtailing of inmates' rights, they are encouraged to implement health schemes that allow inmates to be educated whilst being incarcerated. It is accepted that South Africa may have specific programs that target the major epidemic diseases such as tuberculosis and HIV and AIDS. However, heavy criticism is levelled at this degree of health engagement, as prevention is better than cure. These programs are usually introduced when it is too late and the correctional centres are plagued with infections that spill into and affect the correctional centre staff as well.[882] Sifunda's study illustrates that the correctional centre health environment is a precarious one that demands continued research to address the issues that surface. It was also highlighted in this study as a positive outcome that in lieu of the difficulty in gaining access to correctional centres that are closed and private structures, constant persistence and negotiations with correctional officials and comprehension of the system will allow for fruitful results.[883]

An obvious solution to stop the transmission of HIV in correctional centres is for inmates to stop having sex altogether. Unfortunately, this is not realistic.[884] Minnie et al provide a succinct set of solutions that identify the following key areas that need the State's attention in addressing the problem of HIV and AIDS in correctional centres namely: sex education, correct condom use, monitoring of gang practices, identification and protection of vulnerable inmates, access to HIV and AIDS testing and counselling.[885] Where Guidelines are implemented, their strict application has to be adhered to in order for them to be given effect to.

5.5. Conclusion

This chapter has shown that the correctional centre condition of limited or no access to healthcare severely infringes on inmates' rights to healthcare and life. The transmission of HIV and AIDS, and TB is a reality in South African correctional centres. Various cases ordered for the protection of HIV positive inmates' rights. The crux of the extent of impact of correctional centre conditions

[882]Sifunda et al (note 744 above) 495.
[883]Ibid 507
[884]Luyt (note 626 above) 146.
[885]M Minnie, A Prins & E Van Niekerk 'The Role of Prison Gangs as Precipitating Agent in the spread of HIV/AIDS in South African Prisons with Special Emphasis on Socio-cultural Factors' (2002) 15 Issue 1 *Acta Criminologica* 58 – 59.

on inmates' rights was decided upon in the Constitutional Court. The Lee judgment proved that South Africa is nowhere close to meeting their domestic legislation, not to mention their regional and international obligations. The State was held solely liable for the infringement of an inmate's right to access healthcare facilities. Lee obtained the requisite recourse that he desired to enforce his constitutional rights via litigation. However, the crux of the impact is heightened in so far as Pollsmoor correctional centre conditions, as they are, still continue to infringe upon inmates' rights. Subsequent to the Lee judgment, the State realised the veracity of the impact that the condition of access to healthcare has on inmates' rights and were prompted to improve the HIV and TB treatment for inmates.

CHAPTER 6: CONCLUSION AND RECOMMENDATIONS

6.1. Observations and Conclusions

My dissertation has unlocked the impact of correctional centre conditions on inmates' rights. Drawing from existing literature and case law, the study has unlocked a series of fundamental human rights violations in South African correctional centres. The doors to South Africa's key predicaments of overcrowding, gangsterism, sexual violence and access to healthcare facilities have been opened for critical debate in assessing the impact that these correctional centre conditions have on inmates' rights.

My dissertation has identified three of the topmost correctional centre conditions that require urgent intervention to avoid violating inmates' rights. A study of this nature highlights the constitutional rights of one of South Africa's very vulnerable categories namely inmates. Firstly, I canvass my general observations. Thereafter, I postulate general recommendations for reform of South Africa's correctional centre conditions to circumvent the violation of inmates' rights. Finally, I set out the conclusions under each correctional centre condition and make my recommendations.

It goes without saying that one of the first major conclusions from my dissertation is the fact that inmates have rights. Inmates are endowed with constitutional rights. I have identified inmates' foundational rights and specific rights in relation to the aforementioned correctional centre conditions subject to the limitation clause of the Constitution.

International, regional and domestic instruments have been meshed out in my dissertation to evidence inmates' rights. Thus, any infringement or limitation of rights by South Africa's correctional centre conditions that are not justifiable proves the impact of the problem. What is the impact of correctional centre conditions on inmates' rights?

Throughout my dissertation, I have woven an inextricable thread through each chapter to illustrate the extent of the impact of correctional centre conditions on inmates' rights. My dissertation has proved that it is plausible that overcrowding is a primary cause of correctional centre conditions

and has a profound impact on inmates' rights to human dignity, life, safety and security and healthcare.

Through my investigation, I have established that South Africa does not comply in some instances or inadequately complies in others with its international, regional and domestic obligations to protect and enforce inmates' rights. The State is solely responsible for the infringement of inmates' rights and play an active role in exacerbating correctional centre conditions. Thus, the South African government is responsible for the direct and indirect infringement of inmates' rights. Indirect infringement as in the delictual liability of transmission of communicable diseases in correctional centres.

The case of *McCallum* clearly illustrates that DCS and its staff should not physically, emotionally and sexually abuse inmates. Any form of cruel, inhuman and degrading treatment or punishment is strictly prohibited at international, regional and national levels. The challenges amongst correctional officials, inmates and gang members must not be resolved through violent means. Subsequent to the atrocities committed by St Albans Correctional Facility, the Constitutional Court's report still revealed that DCS is continuing to violate inmates' rights. A special task team should be allocated to investigate and find the perpetrators who must be dismissed.

The *Lee* case has demonstrated that the right to healthcare is paramount as it eventually affects a inmates' right to life where death is inevitable if communicable diseases go untreated. The risk of infection, reinfection and mortality becomes a determinant factor.

The two aforementioned cases have demonstrated that overcrowding, gangsterism and sexual violence and access to limited or no healthcare impact on inmates' rights. These are the incidents that inmates fear upon trying to right their wrongs.

My dissertation has demonstrated that there is a need for enforcing inmates' rights in South African courts by virtue of litigation in the Constitutional Court. I have shown in my analysis of case law that setting a precedent for the protection of inmates' rights is vital. The current Constitutional case of *Lee* proved that the State failed to take steps in preventing the transmission of tuberculosis which in turn violated an inmates' rights.

My dissertation has observed that over a period of 20 years of democracy, correctional centre conditions have severely impacted on inmates' rights. It is easily projected in the future that continued human rights abuses will subsist should immediate proactive action not be implemented in South African correctional centres. The extent of this impact is insurmountable and has far-reaching consequences for South Africa as a democratic country. Inmates are human beings that have the right to life, human dignity and equality. My dissertation has established that the South African government is guilty of human rights violations such as cruel, inhuman and degrading punishment above the many other rights enlisted in chapter two of this dissertation. It is imperative to view the veracity of this offence in the light of South Africa's reputation as a party to various regional and international standards.

South Africa on a scale of 1 to 10, in my view, fairs 2 out of 10 in the meeting of its international, regional and national obligations. The *Lee, Molaudzi, Mhlongo, Nkosi* and *McCallum* cases clearly evidence this score. Case law is a barometer (but not an exhaustive barometer) in which to gauge South Africa's compliance with the law. Our courts and international bodies have ruled against DCS. This should allow DCS to reflect on its practices and reform to meet its obligations. However, this is not the case and DCS has dismally failed inmates and their rights.

I would like to highlight the 2016 concluding observations of the ICCPR regarding South Africa's submission of an initial report that was 14 years overdue.[886] The Committee raised concerns with South Africa's correctional centre conditions more specifically the effects of overcrowding and healthcare services.[887] The prevalence of HIV and AIDS and access to health services to these patients was another matter of great concern raised.[888] The Committee posited a crucial suggestion in that South Africa should amend the Combating of Torture Act to focus on 'specific provisions relating to the right of civil redress and remedy for victims of torture'.[889] Furthermore, it urged South Africa to investigate deaths that occur in correctional centres and prosecute the perpetrators who caused these deaths.[890] One of the most important recommendations to South Africa was to

[886]United Nations ICCPR Human Rights Committee 'Concluding observations on the initial Report of South Africa'. Adopted by the Committee at its 116th session (7 – 31 March 2016). Available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/0871101PDF/G1608710.pdf?OpenElement>.
[887]Ibid 6 para 30.
[888]Ibid 4 para 16.
[889]Ibid 5 para 23.
[890]Ibid 6 para 29.

enforce inmates' rights by treating inmates with dignity and provide for correctional centre conditions that are consistent with the Nelson Mandela Rules.[891]

My conclusions echo the observations posited by the United Nations Human Rights Committee who objectively considered in one session, the consolidated report from South Africa dating back 14 years. This highlights the degree of importance of my research and my recommendations to address the Committee's imminent concerns.

It must be stated that many authors have postulated recommendations for reform. In the next section, I offer recommendations that I deem appropriate upon the conclusion of my study.

6.2. General Recommendations

DCS has an adequate legislative framework with policies, guidelines and solid judicial precedent. South Africa is a party to various regional and international instruments as enumerated in chapter two. Therefore, in theory, South Africa is compliant in ensuring that correctional centres are regulated. However, it fails to practice and implement this theoretical framework. In other words, correctional centre laws and inmates' rights are sound on paper but are not realised to their full potential in correctional centre cells. I am of the opinion that one needs to take a very practical stance on addressing the impact of South Africa's correctional centre conditions on inmates' human rights. I have offered practical solutions, as I understand that no single correctional centre condition can fully be eradicated. Thus, small steps in realising the legal frameworks intention should be born in mind.

The Nelson Mandela Rules creates an annual outreach celebratory program on 18 July each year for the promotion of inmates' rights.[892] This is an untimely commemorative effort for South Africa to inspire the world to participate in bringing life to inmates' rights on this day. However, in order to drive transformation in an administrative body such as a correctional centre and more specifically South African correctional centres, South Africa needs to first look to their own doorstep before crossing boundaries in penitentiary reformation. Severe criticism can be levelled in this regard, upon closer inspection of our correctional centres. South Africa's obligation to

[891]Ibid 6 31 (b).
[892]Nelson Mandela Rules (note 130 above) 5/33.

enforce inmate's rights has now intensified. Our correctional centres in namesake internationally, now needs a magnifying glass to be raised against its bars to scrutinise its commitment to the United Nations Standard Minimum Rules for the Treatment of Prisoners. Not all relevant treaties have been domesticated like CAT and thus I strongly recommend their incorporation.

DCS and JICS need to maintain clear standards in meeting the compliance requirements of international, regional and national obligations. This requires the concerted effort of various stakeholders such as those mentioned in the White Paper on Remand Detention. These government departments included Justice, Crime, Prevention and Security Cluster (JCPS), Department of Justice and Constitutional Development, Legal Aid Board, the SAPS, universities, representatives of the Portfolio Committee on Correctional Services, Parole Boards, Inspecting Judge, Parole Advisory Board, the Judiciary and National Council of Correctional Services. Several non-profit organisations such as NICRO, CSPRI, KHULISA, and Institute for Security Studies amongst others were active role-players in positing recommendations.[893] All stakeholders working as a team can maintain adherence to our international obligations. The State has a general culture of working in silos. Other government departments such as the Department of Health and the Department of Public works can assist collectively in identifying the common enforcement of rights in the community and extend these to correctional centres. Such programs can include a forum within community awareness campaigns for correctional centre workshops regarding HIV and AIDS, and TB treatment in correctional centres to be hosted cumulatively. Therefore, symbiotic relationships need to be built within the State to ensure national compliance. Synergy between the ministers, commissioner, DCS staff, JICS staff, ICCV and the inspecting judge needs to be established. Lawyers and doctors must also contribute to addressing the plight of inmates, as they are privy to confidential information and are in a position to identify inmates' rights violations.

The office of the inspecting judge must maintain full independence to avoid crossing the lines of accountability and transparency. The observations of Justice Cameron in the Pollsmoor correctional centre, three years after the *Lee* case is vital to the function of the judiciary. Thus, I urge that more judges of the Magistrates Court, High Court and Constitutional Court conduct correctional centre inspections to facilitate and validate the need for inmate rights litigation and

[893]White Paper on Remand Detention (note 429 above).

constitutional scrutiny. The reason for the involvement of the various hierarchical courts is to ensure consistency amongst the varying crime, criminals and their admittance into different types of correctional centres. I suggest that a volunteer program involving legal professionals within the judiciary utilising their pro bono hours of obligations in conducting these spot visits could prove to be a viable option. However, specific task teams can be employed at each court level to ensure that consistent reports, feedback sessions and researching solutions are carried out.

The judicial precedent in my dissertation evidences the need for litigation of inmates' rights in South Africa. The cases of *Lee, Molaudzi, Mhlongo, Nkosi* and *McCallum* serve to prove the importance of constitutional and international litigation. It may appear from Justice Cameron's Pollsmoor report that no heed is being paid to case law. However, I do not concur with this contention. Every Constitutional Court case that had emerged stands the test of time. It is important to note that constitutional litigation can result in the following remedies: 'declaration of invalidity, the prohibitory and mandatory interdicts and awards of constitutional damages'.[894] Thus, I would encourage more litigation to be brought to our courts by non-profit organisations such as the Wits Justice Project. In terms of section 38 of the Constitution, anyone may approach the court where it is in the interest of justice.[895] This allows for an opportunity for inmates' rights litigation in the future assuming that resources to research and bring the case are available. In time, specific caselaw regarding overcrowding, gangsterism and sexual violence will also materialise. The groundbreaking *Lee* judgment is an optimistic step in the direction of enforcing inmates' rights in South Africa.

Policy and legislative amendments are advisable, provided there is adequate public consultation. This public consultation should firstly be preceded by raising public awareness of correctional centre conditions and their impact on inmates' rights. However, reciprocation from DCS in applying such amendments to the Correctional Services Act and B Order to specifically address gangsterism and sexual violence is vital. Draft strategies have no basis until they have been fully

[894]Currie and De Waal (note 51 above) 344.
[895]The Constitution. section 38: 'The persons who may approach a court are
(a) anyone acting in their own interest;
(b) anyone acting on behalf of another person who cannot act in their own name;
(c) anyone acting as a member of, or in the interest of, a group or class of persons;
(d) anyone acting in the public interest; and
(e) an association acting in the interest of its members'.

implemented with tangible results to afford them the title of a final working strategy. It is inconceivable for the drafting a roadmap for addressing correctional centre conditions by the State to take more than 20 years.

Remand detainees and migrant detainee statistics need to be consistently maintained. DCS needs to ensure that they maintain reliable data and statistics relating to inmate rape, sexual violence and torture. This obligation has been reinforced by the Nelson Mandela Rules. Such information must be readily available to stakeholders and researchers in order to confront gangsterism, sexual violence and torture in correctional centres. Reliable statistics are important in order to assess the degree of the problem, project future growth, research and develop long term and short term solutions depending on the risk analysis extrapolated from correct figures. An inmate has a right to be safe from gangsterism, unwanted sex and the imposition of a lifelong disease. Every inmate must be accounted for to enable DCS to properly address each individual inmates' needs.

DCS must have a zero tolerance policy to bribery and corruption where large sums of money are squandered. DCS staff need to be properly trained. Education on the plight of inmates in the form of road campaigns, roadshows and national advertisements is imperative. DCS must invite external stakeholders for their strategic sessions to initiate active reform.

6.3. Specific Recommendations

6.3.1. Overcrowding

Overcrowding is a universal problem experienced in correctional centres worldwide. My dissertation's statistics reveal that overcrowding still persists in some of South Africa's correctional centres (as documented above). In an effort to reduce overcrowding, I recommend the following:

1. The State is to convene an investigation by a special committee to investigate DCS's exorbitant rates of 'Fruitless and Wasteful Expenditure'. The findings of such investigation require a proactive stance in the eradication of correctional officials who are squandering the State's money, unlike the Jali Commission's report of 2005, which documented the problems but to date have not brought its findings to fruition. Ensuring that the State's

budget is utilised for the intended purpose, avoiding irregular expenses and effective management of revenue can allow for concerted efforts by DCS to reduce overcrowding to be executed successfully. The EMPP, for example, can be implemented without the risk of fraud as alluded to by the Auditor General.

2. In addition to this State commissioned report, the SAHRC must undertake a follow-up investigation into the issues raised in its 'National Prison Project' report of 1998.
3. A recommendation would be for the SAHRC to investigate the current problem of overcrowding to date and provide a detailed report to address their non-interventionist approach. Considering that they were constitutionally mandated to investigate, report and intervene by taking steps to rectify the violation of inmates' rights. The SAHRC has failed to execute their constitutional mandate regarding the promotion and protection of inmates' rights for 18 years and are to be held accountable.
4. DCS must fully transform the status of the Electronic Monitoring Pilot Project into a fully-fledged workable project. The budgetary constraints in this regard must be investigated by the National Treasury to account for DCS' budget and a separate line item for electronic tagging must be endorsed.
5. Practical solutions regarding bail for remand detainees must be researched by DCS. If an inmate cannot afford R100, simple initiatives can be implemented. I would suggest a points system. Incarceration should be used as a measure of last resort.[896] However, I am of the opinion that electronic tagging would be a more viable option.
6. A more practical initiative is for government to work with and fund non-profit organisations and human rights organisations in the implementation of awareness around South Africa's overcrowding problem. This will allow for government to meet their obligation to raise awareness on inmates' rights and mechanisms to claim them. This can be in the form of a donation fund for remand detainees that cannot afford to pay for bail for example.

[896]WJP Conference (note 24 above) 17.

6.3.2. Gangsterism and Sexual Violence

My dissertation has revealed that the dangerous correctional centre conditions of gangsterism and sexual violence infringes on inmates' rights to be kept in safe custody, the right to life and their right to be free from cruel, inhuman and degrading treatment. South Africa has been found guilty of violating their international, regional and national obligations as in the *McCallum* Case. I recommend the following:

1. Government and Parliament to amend the Correctional Services Act and its correlative regulations to specifically deal with gangsterism and sexual violence. These provisions need to address inmates' rights and recourse when exposed to gang practices and rape. Separate legislation regarding gangsterism and sexual violence can be implemented to assist inmates and staff.
2. A memorandum of understanding between DCS, JICS, ICCVs and SAPS needs to be concluded to create a coherent rape reporting mechanism. I suggest an electronic reporting device such as those found at banks for rating their services. This mechanism can enforce inmates' rights and reinforce anonymity.
3. SAHRC to conduct research into gangsterism and sexual violence in correctional centres to determine the impact that correctional centre conditions have on inmates' rights and to identify workable solutions around correctional centre management of gangs and rape.
4. CCTV equipment must be installed in correctional centre cells and monitored by an independent body such as a security company. Security companies install panic buttons, which can also assist inmates who are being raped to call for immediate assistance.
5. JICS to implement an investigation system in identifying corrupt correctional officials who torture inmates. Such officials must be criminally prosecuted.

6.3.3. Access to Healthcare Facilities

The *Lee* judgment has set groundbreaking precedent for correctional centre litigation regarding an inmate's right to health. An inmate has recourse for the violation of his rights at the Constitutional Court. The State was held liable in delict. However, my dissertation has shown that Pollsmoor's correctional centre conditions are still violating inmate's rights to health. Urgent redress is required. I recommend the following:

1. DCS should employ more doctors, nurses, pharmacists, and medical practitioners. A suggestion is for DCS to create graduate programs with universities to procure the services of medical professionals in correctional centres. This can be similar to the two years of articles served at a law clinic by candidate attorneys. Volunteer programs promoting a career in correctional centre healthcare can attract young doctors to serving our country's correctional centres.
2. DCS should ensure that all inmates are tested for HIV and TB tested at their initial admittance into correctional centres and regular monitoring must be conducted. The inmates that are tested positive at the initial screening are to be granted access to treatment.
3. DCS should provide proper condoms and lubricants to inmates free of charge so as to promote safe sex and reduce the transmission of HIV and AIDS, and STI's.
4. External stakeholders in collaboration with the government should raise awareness of HIV and TB in correctional centres and in the community.
5. DCS should comply with national and international obligations for clean correctional centre conditions. As soon as TB is detected, inmates must be quarantined and provided adequate treatment.
6. Rape cases are to be properly investigated. If initial screenings are conducted, the status records can assist in litigating the intentional transmission of HIV via gang practices to innocent newcomers. Criminal prosecution of the perpetrator could ensue.

6.4. Concluding Remarks

In order to address overcrowding, gangsterism and sexual violence and access to healthcare facilities, concerted research needs to be undertaken and even shadow other comparative jurisdictions for answers.

In conclusion, South Africa's correctional centre conditions are deplorable. The State does not adhere to international, regional and national obligations and such infringes upon inmates' rights. With DCS' poor governance, lack of transparency, accountability and statistics, maintaining high international obligations prove to be difficult.

Correctional centres are a society's collective responsibility. Therefore, the mindset of the society needs transformation to understand the plight of inmates. Anyone can become an inmate. It is not

the fear of a correctional centre but the fear of South Africa's correctional centre conditions and their impact on inmates' rights that create awareness as to the true reality of leading a life as an inmate. However, as for South Africa's correctional centre conditions and their violation of inmates' rights, a lot is yet to be desired.

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